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PENNSYLVANIA

STATE REPORTS.

VOL. CXXVII.

CONTAINING

CASES ADJUDGED

IN THE

Supreme Court of Pennsylvania.

BY

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STATE REPORTER.

VOL. XII.

CONTAINING

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OF THE
SUPREME COURT OF PENNSYLVANIA

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TO THE MEMBERS OF THE BAR.

From the manner in which causes are entitled in the paper books lately filed, it would seem that the act of May 9, 1889, P. L. 158, relating to writs of error and appeals to the Supreme Court, etc., is not well understood. Strictly, common law cases are styled appeals, on the paper books, and different methods of stating the parties are followed; so that with the large number of cases decided and now to be reported there is much confusion resulting.

One of the main purposes of the act was to have the case in the Supreme Court stated in the same order as to parties as it stood on the records of the court below; that is, the plaintiff there is to be the plaintiff here, etc., etc. A good thing which will follow the observance of the act, will be the abandonment sooner or later, of the expressions, "plaintiff in error" and "defendant in error," designations which almost always are confusing, causing one to turn back to see which party is referred to. Another desirable result will be, that a case with which one is familiar in the court below will be more readily traced in the Reports. For instance: in a proceeding in equity, Doe et al. v. Roe et al., John Stiles had to be joined as an interested party. Should John Stiles take an appeal from the decree made, and the cause in the Supreme Court be entitled, Stiles's Appeal, its identity with the case as we know of it is lost.

Outside the foregoing, the Reporter must keep a list of all cases in the Supreme Court as they are argued, also a list of all the cases as they are decided; and when they are not uniformly named it is a matter of difficulty to keep the run of them. He would therefore urge that a uniform method of entitling cases be adopted, not only in the præcipe and in all papers in the record, but in the paper books and especially on their covers, taking care to keep the order of the parties the same as that in the court below, thus:

On an appeal from a common law proceeding and judgment:

JOHN DOE	}	Appeal by defendant (or plaintiff) from the judgment of the Court of Common Pleas of the County of etc., at No. etc. Term 18 .
v.		
RICHARD ROE.		

On an appeal from a decree in a proceeding in equity:

JOHN DOE	}	Appeal by (or defendant or plaintiff) from the decree of the Court of Common Pleas of the County of etc. at No. etc. Term 18 . in Equity.
v.		
RICHARD ROE.		

On an appeal from the Orphans' Court:

ESTATE	}	Appeal of Richard Roe from the decree of the Orphans' Court for the County of etc., at No. etc. Term 18 . O. C.
OF		
JOHN DOE, DECEASED.		

On an appeal in criminal cases:

THE COMMONWEALTH	}	Appeal by defendant (or plaintiff) from the judgment of the Court of Quarter Sessions of the County of etc. at No. etc. Term 18 . Q. S.
v.		
JOHN DOE.		

On an appeal in road cases:

IN RE ROAD	}	Appeal of Richard Roe from the decree of the Court of Quarter Sessions of the County of etc., at No. etc. Term 18 . Q. S.
IN		
SMITH TOWNSHIP.		

The act of assembly referred to, and the Rules of the Supreme Court adopted after its passage, will be found in 125 Pa. xxvi. In 24 W. N. 572, are given convenient forms for præcipes, and excellent suggestions upon the purpose and scope of the act. Beginning with the cases argued at May Term 1889, the form of entitling cases as above given will be strictly adhered to by the

STATE REPORTER.

CASES

IN

THE SUPREME COURT

OF

PENNSYLVANIA.

EASTERN DISTRICT—PHILADELPHIA, 1889.

CLARION, M. & P. R. CO. v. GEORGE C. HAMILTON.

ERROR TO THE COURT OF COMMON PLEAS OF WARREN COUNTY.

Argued May 8, 1889—Decided May 27, 1889.

1. While an erroneous or voidable judgment cannot be affected by a writ of error not taken within the statutory period, a void judgment is no judgment at all, and the person affected by it has a right to have it stricken from the record, and to a writ of error to the refusal of such an order.
2. But if a judgment be erroneously entered for want of an affidavit of defence by a court having jurisdiction of the person and subject matter, it is voidable and not void; and an order refusing to strike it from the record, on a motion made four years after its entry, will not be reversed.

Before PAXSON, C. J., STERRETT, GREEN, CLARK and MITCHELL, JJ.

No. 12 July Term 1889, Sup. Ct.; court below, No. 45 December Term 1884, C. P.

On September 24, 1884, George C. Hamilton brought assumpsit against the Clarion, Mahoning & Pittsburgh Railroad Company, and on October 2d filed a narr with a copy of an account against the defendant company, amounting to \$4,025.90.

127	1
214	2524
127	1
220	280

Statement of Facts.

A Rule of Court provided that, "if the plaintiff shall have filed a copy of the account or instrument of writing on which the suit is founded, with his declaration, on or before the return day of the writ, he shall be entitled to a judgment by default for the amount so claimed, at any time after twenty days from and after the return day of the writ," in default of an affidavit of defence filed by the defendant. Under this rule, on November 6, 1884, a judgment was taken against the defendant for want of an affidavit of defence, and the sum due liquidated at \$4,025.90.

A writ of fieri facias was issued on the foregoing judgment the day it was entered, and returned, no goods. In March, 1887, a creditor's bill was filed by George C. Hamilton and others against the defendant company and certain individuals, named as stockholders thereof, to enforce payment of stock assessments in discharge of the company's indebtedness to the several complainants. This bill was duly served, and embraced, in the indebtedness of the company set out, the judgment of the plaintiff in this case.

On November 12, 1888, the defendant company filed a petition and motion praying that the plaintiff's judgment entered November 6, 1884, should be stricken off, for the reason that the account filed was not of such character that an affidavit of defence was required to prevent judgment.

On December 13, 1888, the court, BROWN, P. J., discharged the rule granted upon the foregoing motion, saying inter alia :

While we are inclined to think that the defendant's counsel are correct in the position that the copy of claim filed is not such as entitled the plaintiffs to a judgment for want of an affidavit of defence, we do not think that the judgment is a void one. It is voidable only, and we think the length of time that has elapsed since the defendant had knowledge of the judgment, and the neglect for so long a time to move to set it aside, coupled with the fact that the defendant, since the rule to strike off the judgment was obtained, has suffered judgment, pro confesso, to be taken against it in the equity suit pending, and with the other facts recited, the defendant must be regarded as having waived the irregularity, if any, in the taking judgment for want of an affidavit of defence. The rule to strike off the judgment is therefore discharged.

Opinion of the Court.

On April 12, 1889, the defendant company, took this writ, assigning the refusal of the court to strike off the judgment as error.

Mr. W. E. Rice (with him *Mr. Charles W. Stone* and *Mr. R. Brown*), for the plaintiff in error.

Mr. Samuel T. Neill (with him *Mr. George N. Frazine* and *Mr. James W. Wiggins*), for the defendant in error.

PER CURIAM:

If this writ of error had been taken to the judgment below, it would have been too late: *Penn. Cent. Ins. Co. v. Gaus*, 91 Pa. 103. The writ was taken, however, to the refusal of the court below to strike off the judgment. The ground of this motion was that the judgment was void. The writ of error was taken out in less than two years from the refusal of the court below to strike it off.

While an erroneous or voidable judgment cannot be affected by a writ of error, unless purchased within the statutory period, a void judgment is no judgment at all. It is something on the record which has no business there, which confers no rights and imposes no obligations. At the same time, it may be a source of annoyance to some one; it may becloud a title or injure credit, and the person who is injuriously affected by it has a right to have it stricken from the record.

The judgment in this case is not a void judgment. The court below had jurisdiction of the person and the subject matter. It was entered for want of an affidavit of defence, and we must assume that the court below regarded the case as coming within the Rule of Court. The defendant thought it did not, and filed no affidavit. This is neither a good nor a safe practice. If a defendant thinks the statement or copy filed does not come within the rule requiring him to file an affidavit, it is the better practice to suggest such fact upon the record. He can then have a decision of the court upon the point. When he decides this question of law for himself, he takes the risk of it being incorrect. In the case in hand, it is at least a question whether the judgment was not properly taken. We are not required to go so far however. It is sufficient to say that it was

Statement of Facts.

not void. Under such circumstances we might well quash this writ. We prefer, however, to affirm the order of the court below refusing to strike off the judgment.

Order affirmed.

 APPEAL OF ISABELLA ROSS ET AL.

[ESTATE OF SOBIESKI ROSS, DECEASED.]

FROM THE DECREE OF THE ORPHANS' COURT OF POTTER
COUNTY.

Argued May 8, 1889—Decided May 27, 1889.

- (a) In 1864, a widower executed and delivered a note under seal for \$5,000, payable to a trustee for his children named therein, five years after date, with interest: on the same day he was married a second time. In 1877, he died, leaving to survive him his widow, the children by his first marriage, and one child by his second, with an estate of \$100,000, of which the personalty was exhausted in the payment of debts, administration expenses and money legacies.
1. In such case, the transaction was a duly executed gift inter vivos, and, considered in connection with the amount of the estate, there being no evidence of fraudulent intent, the note was not in fraud of the rights of the second wife, and was properly payable out of the proceeds of realty, sold either by the decedent in his lifetime, or by his executors within five years after his death under a power in his will.

Before PAXSON, C. J., STERRETT, GREEN, CLARK and MITCHELL, JJ.

No. 195 July Term 1888, Sup. Ct.; court below, No. 14 Docket C., O. C.

On September 22, 1885, W. K. Jones, surviving executor of the will of Sobieski Ross, deceased, filed a third account, showing a balance for distribution of \$8,176.32.

Sobieski Ross, had died October 24, 1877, leaving a will, dated September 9, 1876, and duly admitted to probate, wherein after several special devises and bequests, he devised and bequeathed all his other estate, real and personal, to his executors

Auditor's Report.

with power to sell for the payment of debts and legacies, making his widow, Isabella Ross, and his children, John S., Mary, George F. and Thomas H. Ross, residuary legatees. The widow made her election to take under the will.

In the account under consideration, the accountant had charged himself with \$13,862.38, the balance shown by a former account, made up of the proceeds of the sale of both real and personal estate, and had taken credit for \$6,000, "paid M. A. Ross, trustee, on note." To the allowance of this credit, Mrs. Isabella Ross, for herself and as guardian of Thomas H. Ross, filed exceptions.

On February 26, 1886, *Mr. David Sterrett*, appointed auditor to hear and determine said exceptions, etc., filed the following report:

From the evidence adduced the auditor finds the following facts:

Sobieski Ross, the deceased, died at Coudersport, in the county aforesaid, October 24, 1877, aged 49 years or thereabout. He had been a resident of Coudersport all his life, had been twice married, and left to survive him children by his first wife, John S. Ross, Mary Ross Stanton and George F. Ross, and also Isabella Ross, his widow, and Thomas H. Ross, a child by his second wife, the said Isabella Ross. John S. Ross was born January 7, 1848; Mary was born May, 1850, and George F. was born June 19, 1860. Mary Ross, their mother, died November 20, 1862.

Sobieski Ross and Isabella Ross were married the 19th or 20th of October, 1864. On the morning of the day the marriage was celebrated, and before the marriage ceremony, Sobieski Ross delivered to Mary A. Ross, his mother, a note or writing obligatory under his hand and seal, of which the following is a true and correct copy:

\$5000.

COUDERSPORT, PA., Oct. 19, 1864.

Five years after date, I promise to pay to the order of Mary A. Ross (in trust for John Ross, Mary Ross and George Fox Ross) Five Thousand dollars, without defalcation, value received, with interest payable annually. Witness my hand and seal.

SOBIESKI ROSS. [L. S.]

This note is in the handwriting of Sobieski Ross. It is the

Auditor's Report.

note upon which the payment of \$6,000 was made June 30, 1883, for which the credit is claimed by the executor in his account to which the exception is filed. The payment was in fact made to the said Mary A. Ross, trustee, to apply on the note.

At the time the note was given the said Mary A. Ross was residing in the decedent's family. There is no evidence aliunde of consideration for the note, except as contained in the deposition of Mary A. Ross. This deposition was admitted in evidence, to be considered subject to the admissibility of the testimony in reference to the consideration. Subject to such objection, the auditor finds that there was no money or property consideration to the maker of the note, moving him to its execution and delivery. And, without regard to such testimony, the auditor finds that the real consideration moving him to such execution and delivery, was his natural love and affection for his children named therein as beneficiaries, and his desire to set aside the sum named in the note for their use and benefit.

No payments were made on the note during the lifetime of Sobieski Ross. After the note matured according to its terms, he repeatedly expressed the desire that the fund should be kept entire, until George, the youngest child named therein, should arrive at the age of twenty-one years.

The note was presented to Wm. Jones, one of the executors, for payment, within one year after the death of the said Sobieski Ross.

The inventory of the personal estate of the deceased amounted to \$43,788.45, of which about \$2,500 was unavailable, leaving about \$41,000 collectible; and about \$700 came into hands of the executors in addition to the items in inventory. On October 14, 1864, the said Sobieski Ross conveyed to Mary A. Ross, in trust for John Ross, Mary Ross and George F. Ross, a lot of land in the borough of Coudersport, a part of grantor's homestead lot. The lot conveyed was worth about \$2,500. The consideration expressed in the deed was one dollar. The deed was recorded October 31, 1864. The executor estimated the unimproved real estate of decedent, at the time of his decease, at \$50,000, and his improved real estate at \$17,000. The debts against the estate have all been paid except the balance of the said note held by Mary A. Ross and one other note held by her. The latter does not exceed \$500.

Auditor's Report.

The decedent died testate, having made a last will and testament dated September 9, 1876, which was duly admitted to probate before the register of wills of said county of Potter, October 29, 1877, disposing of the entire estate.

Isabella Ross, the exceptant and widow of said defendant, on March 12, 1879, filed in the office of the clerk of the Orphans' Court of said county, her election to accept the devise and bequest under said will to her in lieu of dower.

On the hearing before the auditor it was contended on behalf of exceptant, in substance, that the obligation of October 19, 1864, was an executory contract, or at most an imperfect gift inter vivos, and could not be enforced unless founded on a valuable consideration, and in support of such position the following authorities were cited: Bispham's Equity, 101-108, and Carhart's App., 78 Pa. 118-19, where the law is stated in the opinion of the court by WOODWARD, J. It was also contended that the giving of the obligation, at the time and under the circumstances proven, was a fraud on the marital rights of the exceptant, Isabella Ross; in support of which position was cited Wharton's Law of Contracts, §§ 166, 399.

On the other hand, it was contended that the obligation was an executed trust and created a legal obligation against the estate of the decedent in favor of the trustee, in support of which the following cases, amongst others, were cited as authority: Candor's App., 27 Pa. 119; Mack's App., 68 Pa. 231; Crawford's App., 61 Pa. 52. In reply to the second position of exceptant's counsel, the following authorities were cited: Pringle v. Pringle, 59 Pa. 281; Hamilton v. Smith, 42 Am. Rep. 39; Butler v. Butler, 30 Am. Rep. 441; and in reference to the effect of the election of the widow to take under the will in lieu of dower, the case of Cox v. Rogers, 77 Pa. 160, was cited.

The fact that the widow elected to take the devise and bequest under the will, in lieu of her right of dower, is not regarded by the auditor as having any bearing on the controversy in this case. This election was a choice between the provisions of the will in her favor, and her right of dower at common law. It was necessary and proper, in order to establish her relations to the estate in this regard. It should not be interpreted to affect her rights in other respects, or be construed to be a

Auditor's Report.

waiver of any rights not directly involved in the choice made by her.

There is no question of actual fraud in this case. Any allegation that a fraud upon the intended wife was designed by the execution and delivery of the note, in order to be a defence would have to be supported by clear proof of facts evincing the fraudulent intent. No such proof is adduced. On the other hand, the owner of a large estate, in contemplation of marriage to a second wife, might execute and deliver to a trustee for his children by a former wife, an obligation such as the one in question, with the most correct and honest motives. And from the authorities above cited, the auditor is of the opinion that the obligation in question is not a fraud upon the personal rights of Isabella Ross.

The obligation of October 18, 1864, being a specialty, needs no consideration to support it. The auditor regards it as an executed obligation, which created, in favor of the children of the obligor named therein, a valid debt against the estate, and concludes that the executor is entitled to credit for the sum paid to apply thereon. He therefore recommends that the exception in this case be dismissed and the account as stated be confirmed.

Mrs. Isabella Ross, for herself and as guardian of Thomas H. Ross, excepted to the auditor's report, in substance, as follows:

1. The auditor erred in finding as mixed matter of law and fact, that the giving of the note in question upon the day of his marriage, without valuable consideration and without notice to his intended wife, taken in connection with the conveyance of his homestead lot and house without valuable consideration, was not a fraud upon the said Isabella Ross, wife and widow of said S. Ross, deceased.⁵

2. The evidence in the case showing that prior to the payment of the \$6,000, for which the executor claims credit in this case, the personalty of said estate of S. Ross had all been exhausted in the payment of his debts and the expenses of administration, and no action having been brought upon said note to recover the same, and five years having elapsed after the death of said S. Ross, before the payment of said \$6,000, the auditor erred in allowing the said payment of \$6,000 to be passed

Opinion of Court below.

to the credit of said accountant, thereby making the same a charge against the proceeds of realty of the estate of said Sobieski Ross, deceased.*

The said exceptions were referred to WILLIAMS, P. J., 4th judicial district, who on March 25, 1887, filed the following opinion :

The argument in support of the exceptions was heard on January 11, 1887. One of the exceptions which was earnestly pressed at that time was, that the auditor erred in not finding that the payments made by the accountant on the note of Mary A. Ross, trustee, were made from the proceeds of real estate sold more than five years after the death of Sobieski Ross. The force of this exception lay in the want of definiteness of statement in the account and in the testimony of the accountant before the auditor, as to the time when the several sales of real estate were made from which the moneys entering into this account were received.

An application was made to re-open the testimony so far as to enable the accountant to fix the dates of these sales. This application was granted and on February 3d, W. K. Jones, the executor, was examined upon this subject.

From this evidence we find as a fact that the sales of real estate from which the moneys appearing in the account were derived, were made in the lifetime of Sobieski Ross, or by his executor, within five years after his decease, except about \$3,000, a sum much less than the balance remaining in the hands of the accountant.

It follows then that the auditor was right in allowing the accountant credit for the money paid Mary A. Ross, trustee, on the note of October 19, 1864, if that note was a valid obligation. It is insisted that the note was not a valid obligation for the reasons, first, that it was a fraud upon Isabella Ross, one of the exceptants, to whom Ross was married on the same day that the note was given ; and second, that it was an unexecuted gift inter vivos. As to the first of these reasons, the facts found by the auditor are a sufficient answer. He found that Sobieski Ross had been previously married, and had three children by the marriage, who are the three persons named as beneficiaries in the note ; that he had, at the date of said note

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and at the time of his decease, real and personal estate exceeding \$100,000 in value, and that no evidence of any fraudulent intent anywhere appears in the evidence. We have looked into the evidence and think the auditor is fully justified in his conclusions. It would seem very clear, therefore, that the arrangement made by Ross was merely a reasonable and natural provision for the children named, and, considered in connection with the amount of property owned by him when it was made, it was by no means a large one, or one of which the exceptant had just reason to complain.

The facts found by the auditor also dispose of the remaining objection urged against the validity of this note. Ross was on the eve of a second marriage. He signed, sealed and delivered the note to his mother, Mary A. Ross, in trust for the three children of his first marriage. A seal imports a consideration, but there is here a good consideration in the natural affection of a father for his children and his obligation to provide for them. The note was not placed in escrow, but was delivered to the payee named therein. It passed wholly and unconditionally out of his control and into the custody and control of the payee. Ross himself recognized this fact and during his life conferred with his mother in regard to the note, the proper time for its payment, and the division of the money among the beneficiaries. There is no room, upon this state of the facts, to hold this note to be an unexecuted gift.

We conclude with the auditor that the note to Mary A. Ross, trustee, was a valid outstanding obligation, that it was the duty of the executor to pay it, and that the funds employed for that purpose do not appear to have been drawn from the sales of real estate made five years after the decease of testator. Under this view of the case the consideration of the question, whether the will of Sobieski Ross by its terms makes a conversion of the real estate, is wholly unnecessary and we do not enter upon it. The exceptions are dismissed and the report of the auditor is confirmed.

Thereupon the exceptant took this appeal, assigning for error :

5, 6. The dismissal of said exceptions.^{5 6}

Statement of Facts.

Mr. C. L. Peck (with him *Mr. M. F. Elliott*), for the appellant.

Mr. John Ormerod and *Mr. H. C. Dornan* (with them *Mr. Benson*, *Mr. Mann*, *Mr. R. Brown*, and *Messrs. Larrabee* and *Lewis*), for the appellees.

PER CURIAM:

We do not think it necessary to add anything to what was said by the learned judge who heard this case upon exceptions in the court below.

The decree is affirmed and the appeal dismissed at the costs of appellants.

G. & I. HORTON v. W. M. HARBRIDGE.

ERROR TO THE COURT OF COMMON PLEAS OF ELK COUNTY.

Argued May 8, 1889—Decided May 27, 1889.

- (a) Plaintiff made a contract with defendants to cut and skid timber at a certain price per thousand feet, the logs to be measured by Scribner's Rule. When the logs were cut and skidded, they were measured by the parties, the contract price paid and a receipt in full given. After some of the logs had been sawed, plaintiff, alleging a mistake against him in the measurement upon which he had settled, remeasured the unsawed logs and brought suit for the difference in the whole.
1. In such case, the mistake in the first measurement being shown, that measurement and the settlement thereon would not bar recovery in this action, and it was not error to charge the jury that if the plaintiff was to have the benefit of the mill measurement of the logs that had been sawed, he should be bound by that measurement of the logs unsawed and remeasured by him.

Before PAXSON, C. J., STERRETT, GREEN, CLARK and MITCHELL, JJ.

No. 214 July Term 1889, Sup. Ct.; court below, No. 15 January Term 1887, C. P.

On November 15, 1886, George and Isaac Horton, trading as G. & I. Horton, entered an appeal from the judgment of a justice of the peace against them in favor of William Har-

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bridge. On February 5, 1887, the plaintiff Harbridge filed a declaration claiming to recover the balance due upon a contract with the defendants for cutting and skidding logs. Issue.

The facts of the case as shown on the trial on November 22, 1887, sufficiently appear in the charge to the jury, *MAYER, P. J.*:

On September 2, 1885, William Harbridge entered into articles of agreement with George and Isaac Horton, by the terms of which he undertook to cut and skid all the saw timber standing upon a certain tract of land situate in Spring Creek township. The trees were to be cut ten inches and over at the stump, and cut in lengths from 8 to 16 feet, as the straightness of the tree would permit. The logs were to be scaled on the skidways by both parties according to Scribner's Rule, one eighth off. The Hortons were to pay Mr. Harbridge the sum of \$2.25 per thousand feet, for all logs cut and skidded under this contract. In pursuance of the terms of the contract, Mr. Harbridge went upon this tract of land, cut and skidded a quantity of saw logs amounting, according to the scale made upon the skidways, to 205 thousand and some hundred feet, which were settled for by the Messrs. Horton on April 10, 1886, and a receipt taken in full for the amount which was claimed to be due by Mr. Harbridge under this contract.

This settlement and scalement would be binding upon Mr. Harbridge, unless the evidence in the case shows that there was a clear mistake made in regard to the scalement of the logs. And the burden of proof is thrown upon Mr. Harbridge to establish to the satisfaction of the jury that there was a mistake in the scalement of the logs. By the terms of the contract, the scalement was to be made by both parties by Scribner's Rule, one eighth off. This mode having been designated by both parties when the contract was made, they would be bound by the scalement, unless the evidence shows that there was a clear mistake made in regard to the scalement.

It is alleged on the part of Mr. Harbridge, that a mistake was made in the scalement of the logs and, for the purpose of showing this mistake, he alleges that the logs that were sawed out upon the mill exceeded in quantity the amount that was scaled in the woods. He claims that a portion of these logs,

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sawed out in 1886, amounted to 175 thousand and some hundred feet, and the balance of the logs were sawed during this year, amounting to 127 thousand and some hundred feet, making a total of over 303 thousand and some hundred feet. And this suit has been brought by him to recover the difference between the scalement made in the woods and what the lumber turned out upon the mill.

He also alleges that he had a scalement made of what remained on the skidways that were not sawed in 1886, by Mr. Zimmerman; that Mr. Zimmerman's scalement amounted to 155 thousand some hundred feet, and that the logs that were measured by Mr. Zimmerman, when sawed upon the mill, only turned out 127 thousand some hundred feet. So, if the jury come to the conclusion that there was a mistake made in the scalement of the logs sawed out upon the mill, we think it is nothing more than fair and right that the plaintiff should be bound by the saw bill with reference to those in the woods measured by Mr. Zimmerman, as well as those sawed on the mill in 1885 [7?] because if he wishes to bind the defendant by the saw bill, saw measurement, of the logs in 1886, there is no reason why Mr. Harbridge should not be bound by the same mode in determining the quantity of those logs; for, according to the testimony, the saw measurements rarely ever amount to as much as the scalement made in the woods, there is a falling short. [So, if you come to the conclusion under the evidence that there was a clear mistake made in the measurement of the logs, then you determine that from the amount that was sawed upon the mill, both in 1886 and 1887.]³

* * * * *

We have been requested by defendants to instruct you as follows:

1. That the contract between the parties dated September 2, 1885, prescribed the manner in which the amount of logs in question was to be ascertained, and that if the jury believe that the parties or their agents scaled said logs on the skidways with Scribner's Rule, one eighth off, and that defendants paid the plaintiff at the rate of \$2.25 per thousand feet therefor, that the plaintiff cannot recover.

Answer: That would be so, unless the evidence satisfies you that there was a clear mistake made in the scalement of

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the logs upon the skidways; then the plaintiff would not be bound by the scalement made in the woods according to the terms of the agreement.¹

2. That the amount of logs in question must be ascertained by a scale in accordance with the terms of the contract between the parties, dated September 2, 1885, regardless of the amount of lumber manufactured therefrom.

Answer: This would be so, unless, as we have already stated to you, the evidence satisfies you that a clear mistake was made in the scalement of the logs on the skidways, as provided by the terms of the contract.²

The jury returned a verdict for the plaintiff for \$261.75. A rule for a new trial having been discharged, judgment was entered on the verdict, when the defendants took this writ, assigning for error:

1, 2. The answers to defendant's points.¹ ²

3. The part of the charge included in [] ³

Mr. John G. Hall (with him *Mr. C. H. McCauley*), for the plaintiffs in error.

Mr. W. W. Barbor (with him *Mr. N. T. Arnold*), for the defendant in error.

PER CURIAM:

The only assignment of error pressed upon the argument at bar, was the third. It alleges that the learned judge below erred in saying to the jury that "If you come to the conclusion, under the evidence, that there was a clear mistake made in the measurement of the logs, then you determine that from the amount that was sawed upon the mill, both in 1886 and 1887."

The plaintiff below had contracted with the defendants to cut into saw logs and skid on skidways, a certain amount of timber; the said logs to be scaled by Scribner's Rule. After the work was all done and paid for, the plaintiff alleged that a mistake had been made in scaling the logs; that they amounted to much more in quantity than had been returned. This suit was brought to recover the difference, and the point to which the above language of the court referred, was the mode of as-

Syllabus.

certaining the true quantity of logs. A large amount of them had been sawed at the mill, and of course could not be re-scaled. As to such, the only means of ascertaining the quantity was by the saw measure. The court below held, that if the plaintiff was to have the benefit of the saw measure, it was only right that he should be held to the same measure as to those in the woods which had not been sawed. This clearly appears in that portion of the charge which immediately precedes the language quoted in the assignment of error. The learned judge charged, that "if the jury come to the conclusion that there was a mistake made in the scalement of the logs sawed out upon the mill, we think it nothing more than fair and right that the plaintiff should be bound by the saw bill with reference to those in the woods measured by Mr. Zimmerman, as well as those sawed on the mill in 1885 [?], because if he wishes to bind the defendant by the saw bill, saw measurement of the logs in 1886, there is no reason why Mr. Harbridge should not be bound by the same mode in determining the quantity of those logs; for, according to the testimony the saw measurements rarely ever amount to as much as the scalement made in the woods, there is a falling short." Then follows, as before stated, the few lines of the charge quoted as error. This furnishes an apt illustration of the effect of severing three or four lines of a charge from its connection. The plaintiff was the only person who could with reason complain of this ruling of the court; it could certainly have done the defendants no harm.

Judgment affirmed.

J. E. BERKSTRESSER ET AL. v. COMMONWEALTH.

ERROR TO THE COURT OF COMMON PLEAS OF WARREN COUNTY.

Argued May 8, 1889—Decided May 27, 1889.

- (a) The defendant in a desertion case was ordered to give security to the commonwealth to pay a weekly sum to his wife, the complainant, and to be committed to the county jail until the order was complied with.

. Statement of Facts.

- (b) On the same day of the order, the defendant, with others as his sureties, executed a voluntary bond, acknowledged before the clerk, conditioned that the defendant should appear at the next Court of Quarter Sessions and give the required security.
1. The said bond was a valid obligation, and, in the absence of an averment in the affidavit of defence that the defendant had complied with its condition or of any facts that in law were the equivalent of a surrender, the plaintiff in interest was entitled to summary judgment.

Before PAXSON, C. J., STERRETT, GREEN, CLARK and MITCHELL, JJ.

No. 228 July Term 1888, Sup. Ct. ; court below, No. 25 June Term 1888, C. P.

On March 23, 1888, an action in assumpsit was brought in the name of the commonwealth, for use of L. Amelia Berkstresser, against John E. Berkstresser, F. A. Cogswell, W. E. Rice and Perry D. Clark.

On April 2, 1888, the plaintiff filed a statement of claim, which set forth in substance that on June 11, 1887, John E. Berkstresser, being convicted of wife desertion, was ordered to pay to L. Amelia Berkstresser, the complainant, the sum of \$4 per week, payable quarterly, to be computed from that date, and to give security to the commonwealth by one or more sureties in the sum of \$500 for compliance with said order, to pay the costs, and to be committed to the county jail till the order was complied with ; that said John E. Berkstresser, not being then prepared to comply with the said order of the court, procured and delivered to the clerk of said court, as a temporary security, a bond or writing obligatory, duly executed under seal by all the defendants in this case, and by filing the same, procured his discharge from prison and the custody of the sheriff, of which bond the following was a copy :

“ J. E. Berkstresser, F. A. Cogswell, Perry D. Clark and W. E. Rice ; you and each of you acknowledge to owe the commonwealth of Pennsylvania the sum of five hundred dollars, to be levied of your goods and chattels, lands and tenements respectively, upon condition that if the said J. E. Berkstresser shall personally be and appear at the next Court of Quarter Sessions of the Peace, to be held in and for the county of Warren, Pa., and be of good behavior to all citizens

Statement of Facts.

of the commonwealth, and especially towards his wife, give sureties as ordered in this case, or you are to be held sureties for him as ordered by the court in this case."

That the said John E. Berkstresser, not regarding his duty to comply with the said order of the court, or the obligation voluntarily assumed by himself and the other defendants, did not appear at the next Court of Quarter Sessions of the Peace to be held in and for the county of Warren and give the security ordered in the case by the court, as required by the condition of said bond or writing obligatory, nor had he paid the plaintiff in interest the said sum of \$4 per week, as required by said order; Wherefore, etc.

On April 11, 1888, the defendants filed an affidavit of defence, the material parts of which were as follows:

"That the said J. E. Berkstresser did comply with the order of the Court of Quarter Sessions referred to in plaintiff's statement of claim, by paying all the costs therein, and the amount decreed by the court to and including December 10, 1887, being the sum of \$104, to apply on said alimony, \$52 thereof on September 9, 1887, and a like amount on December 9, 1887.

"That afterwards, to wit, on March 8, 1888, when nothing was due or remaining unpaid under the said decree of the Court of Quarter Sessions, the said F. A. Cogswell, W. E. Rice and Perry D. Clark, three of these defendants, having given notice to the sheriff of Warren county that they would present the body of John E. Berkstresser aforesaid in open court the same day, the sheriff being the same person who had the said John E. Berkstresser in custody at the time of the giving of the alleged recognizance upon which this suit is brought, did then and there produce the body of the said John E. Berkstresser in open Court of Quarter Sessions then and there being held in and for Warren county, and then and there presented to said court a petition [reciting the above bond, and that the petitioners had now brought the body of said J. E. Berkstresser into court, praying leave to surrender him to the court and be discharged,] on which petition the court had granted a rule to show cause returnable on March 9, 1888.

"That on the same 8th day of March and after the presenting of said petition, said defendants again notified the sheriff, then being in his office in the court house, that said Berkstres-

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ser would be again produced in open court on the following day; that according to the view expressed by the court, said Berkstresser was not legally discharged from the sheriff's custody.

"That on March 9, 1888, the said defendants again produced the body of the said Berkstresser in open Court of Quarter Sessions, and surrendered him and asked the granting of their said petition, and said court made the following order thereon, or an order of which the following is a copy :

"March 9, 1888, it appearing to the court that the defendant, J. E. Berkstresser never gave the security directed by the court, the court declines to act on this petition."

"That after the said order of court was made and on the same day, the said defendants notified the said sheriff of the purport thereof, and therefore on the same day the said Berkstresser was in company with the said sheriff when said Berkstresser could have been taken into custody by him, had said sheriff desired so to do.

"That said defendant, J. E. Berkstresser, did appear at the next Court of Quarter Sessions held in and for the county of Warren, after the signing of the paper alleged to be a bond or obligation in the plaintiff's statement of claim, recited, to wit, September Sessions, 1887.

"Deponents further say that they are now, and always have been, ready and willing and able, as they believe, to deliver up the body of the said J. E. Berkstresser in open court, or to the sheriff, or at any other lawful place, and in any lawful manner, when they can be permitted to do so."

The plaintiff having taken a rule for judgment for want of a sufficient affidavit of defence, the court, BROWN, P. J., on July 23, 1888, filed the following opinion and decree:

On June 11, 1887, J. E. Berkstresser had a hearing before the Court of Quarter Sessions upon a charge of wife desertion, and was ordered to give security to the commonwealth for the payment to his wife, L. Amelia Berkstresser, the sum of \$4 per week, and to pay the costs of the proceeding, and his commitment to the county jail was directed until the order should be complied with. He never complied with the order. Although constructively in the custody of the sheriff, it does not appear

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by any direct or positive averment that the sheriff had taken said Berkstresser into actual custody. On the same day of the order, Berkstresser and the other defendants in this suit, under their hands and seals respectively, executed the obligation in suit, conditioned that said Berkstresser should appear at the next Court of Quarter Sessions and give the security ordered by the court in the proceedings for desertion. This obligation was taken and acknowledged before the clerk of the court. The affidavit of defence does not state that the sheriff had any knowledge of the terms of the obligation executed by the defendants, or that he consented that Berkstresser might be discharged from imprisonment. From the fact that he did not put the defendant, Berkstresser, in jail, it is not unreasonable to surmise that he was informed that security had been given and that he supposed that it was the security ordered by the court, and that hence his duty had ended. But whether this is so or not, we are of opinion that the obligation in suit was the voluntary obligation of the defendants. The terms are, in substance, that defendants shall be liable, if Berkstresser shall fail to appear at the next Court of Quarter Sessions and give the security ordered by the court. There is no averment that the defendant did appear and give the security ordered. We see nothing illegal in the terms of the obligation, and the affidavit of defence states no fact showing illegality in the consideration, or any policy of law forbidding the enforcement of defendants' contract in accordance with its terms. We do not deem it necessary to decide whether the sureties might surrender the body of the principal to the sheriff, in discharge of their liability, because a careful reading of the affidavit does not in our opinion show any facts that in law are the equivalent of such surrender.

The rule for judgment for want of a sufficient affidavit of defence is made absolute.

Judgment having been entered for the plaintiff for \$500, the defendants took this writ, assigning as error the order making absolute the rule for judgment for want of a sufficient affidavit of defence.

Mr. Charles H. Noyes (with him *Mr. Watson D. Hinckley*),
for the plaintiffs in error.

Statement of Facts.

Mr. W. M. Lindsey (with him *Mr. S. P. Johnson* and *Mr. J. O. Parmlee*), for the defendant in error.

PER CURIAM:

This case is affirmed upon the opinion of the learned judge of the court below.

Judgment affirmed.

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JOSEPH GATES v. C. F. WATT ET AL.

ERROR TO THE COURT OF COMMON PLEAS OF MCKEAN COUNTY.

Argued May 9, 1889—Decided May 27, 1889.

In an action against several defendants impleaded as partners, one of them denied that he was a partner with the others. There being more than a scintilla of evidence upon the question of fact thus at issue, it was not error to submit it to the jury; and the only remedy for a verdict against the weight of the evidence was by an application to set the verdict aside.

Before PAXSON, C. J., STERRETT, GREEN, CLARK and MITCHELL, JJ.

No. 44 January Term 1889, Sup. Ct.; court below, No. 401 May Term 1883, C. P.

On April 20, 1883, an action of assumpsit was brought by C. F. Watt and J. B. McElwaine, lately trading as Watt & McElwaine, now to the use of J. B. McElwaine, against Charles Sipler, John J. Ashbaugh, Joseph Gates and Eli Logue, partners, lately trading as Sipler, Ashbaugh & Co. Joseph Gates alone was served, and to the plaintiffs' narr in the common counts, to which was attached a copy of a book account for goods sold and delivered, he pleaded, non-assumpsit.

At the trial on February 15, 1889, the sole contention was upon the fact whether or not the defendant Gates was a member of the partnership against which the writ issued. Testi-

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mony was introduced from which it was claimed on the part of the plaintiff that the defendants in the writ were partners in the drilling of an oil well for which the goods were supplied; that Gates had a one fourth interest therein, and in the leasehold on which it was located, contributing one fourth of the cost thereof. The plaintiff testified that he had presented the bill to the defendant: "I spoke to him about it, and told him about the unsettled account of Sipler, Ashbaugh & Co., and told him it was time it was settled, and he asked why I hadn't spoke to him about it before; that he supposed the matter was settled; that he had paid his share and more too, and didn't think he ought to pay any more. I told him it was not my fault, that it was not settled; that it was his business to see that it was settled. I had spoken to the other parties."

The defendant denied that he was a partner in the drilling of the well and testified that he had only purchased a one fourth interest in the lease with the well upon it drilled to completion. On cross-examination, he was asked: "Q. Suppose the well never was completed, what part of the stuff would you have owned? A. I would have owned one fourth."

The other testimony submitted sufficiently appears in the charge to the jury, OLMSTED, P. J.:

The case which you have been sworn to try is an action of assumpsit brought by Watt & McElwaine for the use of McElwaine, against four persons as partners; against Gates, Sipler, Ashbaugh and Logue as partners. The allegation on the part of the plaintiff is, that these four persons were partners in the oil business in Butler or Clarion county in this state, and that he sold a quantity of goods on the credit of this partnership. The evidence seems to show that the goods were sold sometime in November or December of 1876. The defendants here defend on the allegation that there was no partnership existing between these four men who are sued as partners.

Before we proceed any further we have been requested by counsel for defendant to answer certain points in writing, which we will answer now and proceed with our general charge.

1. The plaintiff having sued the defendants jointly, he can only recover on proof that all the defendants named in his

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præcipe and declaration were partners of the alleged firm in fact, or that each and all of the defendants either held themselves out as partners or knowingly permitted it to be done.

Answer: We affirm this point as a correct statement of the law applicable to partnerships, as we understand it.

2. There is no evidence to warrant or justify the jury in finding that at any time prior to the first of February, 1877, or at any other time, the defendants, Ashbaugh, Gates and Logue, were copartners of Sipler, as alleged in plaintiff's pleadings.

Answer: We cannot affirm this point, but call your attention in our general charge to the evidence bearing on the question of partnership.²

3. There is not a scintilla of evidence that all of the defendants sued were partners at or prior to the alleged sale of the goods claimed for in this suit, and there being no evidence of any subsequent undertaking of each and all of them to pay for said goods, or any of them, the plaintiff cannot recover.

Answer: We cannot affirm this point. We cannot say there is not a scintilla of evidence that the defendants were partners at the time of the sale of the goods.³

4. Under the evidence in this case, it is purely a question of law for the court, whether or not the plaintiff has proved a co-partnership between all of the defendants sued, and if he has not he cannot recover.

Answer: We cannot affirm this point. It would ask us to take the case from the jury, and say to them that there was no evidence from which a partnership could be found by the jury, in the case, and that therefore the plaintiff could not recover. The conclusion of this point is correct, if there is no evidence, or not sufficient evidence of a partnership in the case; then it is true as stated here that the plaintiff cannot recover.⁴

* * * * *

[Now, how is the alleged partnership proved in this case? We have been asked to withdraw the case from the jury, and hold as a matter of law, under the evidence, that there is no proof whatever of a partnership between these defendants. We have had some doubt as to our duty in this respect, but conclude that there is some evidence upon this subject that should go to the jury on the subject of a partnership, although we deem it our duty to say to you that the evidence going to show

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that the defendants were partners is not strong. Yet we think we should not withdraw it from your consideration, but trust that you will examine the evidence closely, and find a verdict upon the evidence and the evidence only.]⁵

No question is raised about the sale of the goods sued for, and their delivery to Sipler, one of the defendants; the question is, were these defendants partners and can they be called upon to pay for these goods?

The goods seem to have been delivered to Sipler in the fall of 1876. The amount is 354.76; no controversy about that. The last charge, I think, was December 19, 1876. A larger amount of goods seem from the testimony of McElwaine to have been sold in the same way, and several payments made by Sipler reducing the claim to the amount claimed in this action. I think McElwaine testified to that, to two payments, perhaps, by Sipler. But were these defendants partners at the time of the sale and delivery of these goods? The goods seem to have been charged to Sipler, Ashbaugh & Co., but this is a fact of no consequence in the case as establishing the partnership.

The plaintiff contends that the defendants were partners in putting down an oil well, and the defendants contend that the arrangements between them did not constitute a partnership, and Sipler, Gates and Ashbaugh have each taken the stand and each denied that any partnership existed between them, and each state the facts from which it is claimed by the plaintiff that a partnership is to be found, taken in connection with the other evidence. We have said to you that men may be held liable as partners, who hold themselves out to the world as partners, and thereby obtain credit. But there is no sufficient evidence that these parties held themselves out to the world as partners, and no recovery can be had against them for such reason, unless you find that they were partners in fact. Sipler is the only one of them that ever, according to the evidence, claimed that they were partners; and this is not such a holding out as partners as would make Ashbaugh, Gates and Logue partners or liable under it, unless they were actually partners in fact by their own agreement. And we say to you there can be no recovery in this case, unless you find that the defendants were, each and all of them, members of the partnership to which the goods were delivered.

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Now the evidence on the question of the partnership is confined mainly to the testimony of Sipler, Gates and Ashbaugh, I think they were the ones that were sworn. It is testified, or contended, or not denied, and evident from the evidence in the case, that in February, 1877, the February succeeding the November or December that the goods were delivered, a partnership was formed between Sipler, Morgan, Ashbaugh and Logue, but there is no allegation that Gates upon whom this writ in this case was served, was a member of that firm, and if he was, no recovery could be had in this case against that partnership formed afterwards, unless they were partners at the time of the sale of the goods. The partnership must exist at the time the credit was obtained or there can be no recovery. It is alleged and testified that Gates bought a one fourth interest in an oil well of Sipler. [Gates testified that it was to be put down by Sipler, and that at the end he was to pay to Sipler what it cost to put down the well, one fourth of it, and that there was no agreement, arrangement or understanding for a partnership, or any understanding at that time that there was anything else in the transaction other than the purchase by him of a one fourth interest in a finished well. Sipler testifies substantially in the same way. The testimony is for you.]⁶ It is alleged that Sipler testifies carelessly and that his recollection is faulty and his testimony not always consistent with itself. That is for you. Ashbaugh says that he bought his interest in the same way, and that he knew nothing of how Gates acquired his interest.

If this were all there is in this case, we say to you that we do not think it would make these parties partners in such a way as to be liable for the debt sued for here. A simple purchase of a one fourth interest in a finished well, the seller to put it down at his own cost and to receive the pay for it from the purchaser, we do not think would make of itself the purchaser liable as a partner, if he does not hold himself out as a partner. The witnesses all testify that this was the character of the transaction; that is, the witnesses for the defendants: that Sipler was paid in full for the well. They testify too that there was no agreement or understanding whether or not there was to be a future partnership or future operation. But it is claimed by the plaintiff that there are circumstances surround-

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ing the transaction, going to show that these parties were partners, and that they have not testified truthfully. Now of course this evidence is for you, and we do not withdraw it from you. But is it sufficient to overcome what appears to be almost the uncontradicted evidence in the case of the three defendants who have testified as to this transaction? There is no evidence in the case that Gates, Ashbaugh or Logue knew anything about goods being bought by Sipler and charged to the partnership of which they were alleged to be members. Gates and Ashbaugh both testify that they had no knowledge of this, and no one swears that they did at the time of the transaction. Gates testifies that the first knowledge that he had of it was some months afterwards. I don't recollect how long, and it is not important. When a bill was presented to him by Mr. McElwaine, in which this was charged in this way, McElwaine testifies that at that time Gates says, "Why didn't you present that before?" and complained of the length of time. And Gates says that he contended at that time that he was not liable and did not belong to any such partnership. And he says that he did not admit any partnership except so far as it was an admission of it not to deny it at that time; but that is not a question of great consequence in the case, for that is not such a holding out to the world that they were partners as would make them liable and authorize the plaintiff to recover against them unless they were partners in fact.

Now, we have endeavored to impress upon your minds the view that we take of this case. If this transaction was simply a purchase by Gates of a one fourth interest in a well to be finished by Sipler, and Gates to pay Sipler for the putting of it down, and that was all, and the other man acquired his interest in the same way, as we have already said to you, that, as we think, of itself, and that is more a question of law than of fact,—we do not think under the authorities as we understand them that that would make these parties liable as partners; and you could not find that these parties were partners unless there was something else in the case besides this evidence that is sufficient to overcome the testimony of the defendants, themselves, and sufficient to justify the jury in coming to the conclusion that there was an actual partnership between these parties at the time. [If this was a purchase of a one fourth

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interest and these parties were to go on and put down this well—these four men who owned it—at their joint expense, then we say that would be a partnership such as would make the defendants liable.]⁷ But if it was a simple purchase by each of these parties as they testify, of a one fourth interest in a finished well, it would be holding the rule too strictly, or too loosely rather, to make parties liable under such circumstances. And we have already said to you that the fact that there was a partnership formed in February would not make these men liable here at all. Gates, according to the testimony, was not a member of the partnership, and unless he was a member at the time of the credit there could be no recovery, but if Gates had been a member of the partnership formed in February it would not make him liable at all from that fact. [If you do find from the evidence that these four men were partners at the time these goods were delivered, and the credit was obtained on the strength of this partnership, then your verdict will be for the plaintiff for the amount of the debt with interest.]⁸

But you will bear in mind that you are not to find them partners unless you find from the evidence that in fact they were partners by agreement between themselves in some way. There is some evidence, Sipler denies it and McElwaine affirms it, that Sipler gave the names of this partnership and the names of the partners to Mr. McElwaine. That declaration would not hold Logue, Gates and Ashbaugh, for the declaration of one partner cannot bind the partnership in that way; it would be a very dangerous rule to do that. Whatever your view may be as to whether Sipler said that at the time, would not be very important in this case, and of itself it would be nothing, so far as liability on the part of the others is concerned.

The jury returned a verdict in favor of the plaintiff for \$562.64. A rule for a new trial having been discharged, the defendant took this writ assigning as error:

1. The court erred in admitting the plaintiff's offer of evidence contained in the following bill of exceptions: *

Q. State the form in which the account was entered on the books?

* See Hawes v. O'Reilly, 126 Pa. 440; and Battles v. Sliney, 126 Pa. 460.

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Objected to as incompetent at this time, on the ground that the defendant is sued as a copartner and there is no evidence of any copartnership whatever, and that they are not permitted to prove it in this way.

By the court: We think the objection is not good at this time; that the question of proving the partnership, while it would be necessary to prove it in order to recover, yet the question whether it should be proved now or at some other point in the trial is one of order, and the objection is overruled. Exception by defendant's counsel and bill sealed this 15th of February, 1887.

A. G. OLMSTED, P. J.

A. It was made to Charles Sipler, J. J. Ashbaugh, Joseph Gates and Eli Logue, as Sipler, Ashbaugh & Co.

2-4. The answers to defendant's points.³ 4

5-8. The portions of the charge included in []⁵ 8

Mr. J. W. Bouton (with him *Mr. John N. Apple*), for the plaintiff in error.

Mr. J. W. Lee (with him *Mr. W. E. Burdick* and *Messrs. Hastings & Criswell*), for the defendants in error.

PER CURIAM:

The first assignment is not in conformity to the Rules of Court, and will not be considered. See *Battles v. Sliney*, decided at this term [126 Pa.460]. The remaining assignments refer to the rulings of the court below. By the defendant's second point the learned judge was asked to instruct the jury that "There is no evidence to warrant or justify the jury in finding that at any time prior to the first of February, 1877, or at any other time, the defendants, Ashbaugh, Gates and Logue, were copartners of Sipler, as alleged in plaintiffs' pleadings." The court declined to affirm this point. This is the pinch of the case. While the evidence of the partnership was not strong, there was evidence, and more than a scintilla; enough to carry the case to the jury. If the verdict was against the weight of the evidence upon this point, the only remedy was to ask the court below to set it aside for that reason. There is no remedy here. We find no error in the rulings of the court.

Judgment affirmed.

Statement of Facts.

B. G. MORRISON v. C. COLLINS ET AL.

ERROR TO THE COURT OF COMMON PLEAS OF WARREN COUNTY.

Argued May 9, 1889—Decided May 27, 1889.

1. In an action upon a note under seal, brought within twenty years from the time the right of action accrued, the burden is upon the defendant to prove payment, or facts and circumstances from which the jury may properly infer payment.*
2. In such action, the fact that the holder was constantly pressed for money, while the defendant was abundantly able to pay, with other circumstances, might justify the presumption of payment within the twenty years, yet such presumption would not arise from the single fact that the defendant was able to pay.
3. The fact that in a settlement of open accounts between the parties, about six years after the date of the note, a balance equal to the amount of the note was found in favor of the maker, while not establishing a set-off, because of the statute of limitations, was yet admissible as tending to establish payment.

Before PAXSON, C. J., STERRETT, GREEN, CLARK and MITCHELL, JJ.

No. 245 January Term 1889, Sup. Ct.; court below, No. 17 December Term 1887, C. P.

On July 9, 1887, an action of assumpsit was brought by William Reed against B. G. Morrison on a note which was as follows :

WEST HICKORY, March 4, 1871.

Due William Reed two hundred dollars, money loaned to pay on land. Witness my hand and seal.

[Signed] B. G. Morrison, (L. S.)

The defendant pleaded non-assumpsit, payment, set-off, statute of limitations. Issue.

On April 24, 1888, the death of the plaintiff was suggested, and C. Collins, W. P. Murray and F. C. Osborn, his executors, were substituted.

At the trial on October 3, 1888, the note having been put in

* See Gregory v. Commonwealth, 121 Pa. 611; Porter v. Nelson, 121 Pa. 628; Breneman's App., 121 Pa. 641; Runner's App., 121 Pa. 649.

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evidence after proof of execution, the defendant called Joseph Clark, who testified that the plaintiff and defendant were in the oil business together from 1870 to 1878, and witness was their book-keeper after 1876; that in 1877, the witness made out a statement of some old accounts between the parties, and there was a balance of between \$200 and \$250 in favor of Mr. Morrison; that Mr. Reed told Morrison, to leave it off, any time would do to settle up these old matters, and they put the matter off. Dr. John Sager testified to a conversation he had with Mr. Reed in 1883, in which the latter said he had had a long litigation with Mr. Morrison, and that his business and matters were all settled up, and closed up, and he was glad of it.

Joseph Clark, recalled :

Q. What were Mr. Morrison's circumstances during the time that you knew him ?

Objected to.

Defendant's counsel proposed to prove by the witness that for several years after the obligation in suit matured, he, the defendant, had abundance of means from which the debt could be collected, and abundance of means with which to pay it; this, with other circumstances in the case, and the long lapse of time from the maturity of the note before suit, are circumstances from which the jury may infer the payment of the obligation.

Objected to, as incompetent.

By the court: The other circumstances referred to not being mentioned in the proposition, the objection is sustained, and testimony rejected. Exception.⁶

Defendant then proposed to show by the witness, that for several years after making the obligation in suit, the defendant had an abundance of property from which it could be collected, and abundance of means with which to pay it; this and the long lapse of time from the maturity of the note to the bringing of suit, are circumstances from which the jury may infer payment.

Objected to as incompetent.

By the court: Objection sustained, and testimony rejected. Exception.⁷

The court, BROWN, P. J., charged the jury as follows :

The plaintiffs, who are the representatives of William Reed,

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deceased, bring this suit against B. G. Morrison, in which they claim to recover the sum of \$200, with interest from March 4, 1871, to the present time. This claim is based upon a note, bearing date March 4, 1871, and is, by its terms, due, and is under seal. This makes out the case of the plaintiffs, and it is incumbent upon the defendant to satisfy you that the note is paid, or settled in some way, or that it is not a legitimate demand.

The claim of the defendant is based in part upon the testimony of Mr. Clark. It would seem from the evidence, that the defendant, Mr. Morrison, and the deceased, Mr. Reed, had numerous and somewhat extensive business dealings with each other. Mr. Clark testifies that he was employed as book-keeper for Mr. Reed; that along in 1877 he was required to make out a statement embracing some business matters and some old affairs, as he expressed it, between these parties; that he made out such a statement, running back four, five or six years, I don't remember just how long, and that when Mr. Reed and the defendant were present at one time, Mr. Reed recognized this statement as being correct, and according to the testimony of the witness it would show that \$200 to \$250 was due the defendant, Morrison.

As to this evidence, the plaintiffs claim that if you find there was a balance of account due from Mr. Reed to Mr. Morrison in 1877, that it cannot be used as an offset against the claim of the plaintiffs, because more than six years has elapsed since the balance was ascertained, and hence the claim to the offset would be barred by the statute of limitations. We say to you that the plaintiffs are correct in this. The evidence of Mr. Clark, as to the balance due from Mr. Reed to Mr. Morrison in 1877, does not avail the defendant, except in so far as it tends to satisfy you that this note has in fact been paid. What we mean is, that the balance as stated by Mr. Clark, if it existed, cannot be used as an offset, because more than six years has elapsed, and the statute of limitations applies to the offset just the same as it does to the claim. Hence, we say that the balance would not avail the defendant except in so far as it tends to satisfy you that the note in suit was in fact paid. There is no evidence of any agreement between Mr. Reed and Mr. Morrison applying the balance testified to by Mr. Clark, on the note in

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suit. [There is no direct evidence that this note was included in any looking over between Mr. Reed and Mr. Morrison. Mr. Clark testifies to making out the statement of the account, showing from \$200 to \$250 due Mr. Morrison, and in substance that Mr. Reed recognized the statement to be correct. Does this satisfy you either that the note was taken into the account when that balance was arrived at, or that the note had been previously paid? This is a question of fact for you, and an item of evidence for you to consider.]⁴

[If you find from the whole evidence that the note is paid, then you should find for the defendant. But it is the business of the defendant to satisfy you, by evidence, that the note in suit has been paid, and if he has not done so, your verdict should be for the plaintiffs. Bear in mind that it is incumbent upon the defendant to overcome the presumption of non-payment that arises from the production by the plaintiffs of the note itself.]⁵

Further, as showing payment, or an item tending in that direction, evidence is given of some business transactions between these parties, Mr. Reed and Mr. Morrison, in 1872, in which Mr. Reed in two instances certifies, first, in substance, that Mr. Morrison had put down a well for him, as agent, on the McIntyre farm in Forest county, Pa., and expended \$3,840 in purchasing engine, boiler, tubing, casing and other fixtures, including drilling, etc., to his entire satisfaction. That is signed by Mr. Reed, and another of like import amounting to some \$1,725. Now, from these business transactions, counsel for defendant ask you to infer that inasmuch as there were these large business transactions between these parties subsequent to the giving of this note, that it is an item you may consider in determining whether the note is in fact paid.

Another item of evidence the defendant gives, which you should consider for just what it is worth, is a letter written from Mr. Reed to Mr. Morrison before this note was given. It was December 24, 1870, and in that letter Mr. Reed says: "In regard to furnishing you the \$200, I have no objections, if you can let it stand in compensation for services rendered and to be." From that he asks you to say that the \$200 that is embraced in this note was money furnished on the terms stated in that letter. That is a question for you to consider, and the weight it should have in the matter, if any.

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The defendant also calls Dr. Sager, who testifies that he knew Mr. Reed, that he had a conversation with him in 1883. The Doctor states the conversation, and where it was, and you are to determine the weight that shall be given to his testimony. He says that he saw Mr. Reed, and they had some conversation in regard to litigation; that Mr. Reed said he had had a long litigation with Mr. Morrison, and that all business matters between him and Morrison had been settled up, and that he was glad of it. That is an item for you to take into account in determining whether this note was settled and arranged between the parties.

The defendant asks us to charge you as follows:

1. If the jury believe from the evidence that about five years after this note was made, there appears to be due to the defendant from William Reed, a sum equal to or greater than the face of the note, they may infer from that fact, together with the other facts in the case, in view of the length of time from the making of the note to the time of bringing suit, that the note in controversy has been paid.

Answer: We answer this point by saying, that if the jury are satisfied from the evidence, that about five years after the note in suit was made there was due from Wm. Reed to the defendant, Morrison, a sum equal to or greater than the amount of the note, that fact may be considered by you with the other evidence in the case, in determining whether the claim of the defendant, that the note in suit is paid, is sustained.²

2. After the lapse of sixteen years from the making of a note, the presumption of its payment may be drawn from slight circumstances indicating that the note may have been paid.

Answer: This point is affirmed, but you must bear in mind that the burden of showing payment of the claim in suit rests on the defendant, and you should not find such payment unless the evidence thereof satisfies you that payment or settlement of the note has in fact been made.³

The jury returned a verdict for plaintiffs for \$410. A rule for a new trial having been discharged, judgment was entered on the verdict, when the defendant took this writ, assigning as error:

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- 2, 3. The answers to the defendant's points.^{2 3}
- 4, 5. The portions of the charge included in []^{4 5}
- 6, 7. The refusal of defendant's offers.^{6 7}

Mr. D. I. Ball (with him *Mr. C. C. Thompson*), for the plaintiff in error.

Mr. W. E. Rice (with him *Mr. R. Brown*, *Mr. C. W. Stone* and *Mr. H. E. Brown*), for the defendants in error.

PER CURIAM:

The note in controversy was under seal. In such case, the presumption of payment does not arise until twenty years have elapsed. At least this is the general rule. There are cases which intimate that a presumption of payment may arise in less than twenty years; that is to say, there may be such circumstances surrounding a case as would justify a jury in finding the fact of payment within the twenty years. Thus, if it be proved that the holder of the note has been constantly pressed for money, while the maker was abundantly able to pay, such fact, with other circumstances, might justify the presumption of payment. The single circumstance that the defendant was able to pay, would not be a fact from which this presumption would arise in less than twenty years. For, if the defendant is able to pay, the plaintiff may be able and willing to wait, and within the twenty years the burden is upon the defendant to prove payment, or such facts or circumstances from which the jury may properly infer payment. An examination of the case shows that the rulings of the learned judge below were quite as favorable to the defendant as he had any right to expect.

Judgment affirmed.

APPEAL OF J. A. WEIBLE, ET AL.

[KUHN V. WEIBLE, ET AL.]

FROM THE DECREE OF THE COURT OF COMMON PLEAS OF
WARREN COUNTY, IN EQUITY.

Argued May 10, 1889—Decided May 27, 1889.

- (a) In 1881, Marsh and Kuhn procured an oil lease subject to forfeiture on failure to operate thereunder. No operations were begun, but on August 4, 1883, the lease was renewed on condition that active operations should begin within 30 days, and on the same day M. and K. assigned a one third interest to Weible.
 - (b) Operations were begun, but discontinued. On May 9, 1884, a new lease was made by the landowners to Brown, who on May 12th assigned a one half interest therein to C. and J., and the other one half interest to Weible. Operations under this lease were successful, and on June 18th, Kuhn filed a bill in equity to establish his one third interest in the leasehold and for an injunction and account.
 - (c) The master found, upon the facts in evidence, that Brown, in procuring the lease of May 9th, was the agent of Weible; that Kuhn's rights under the original lease and renewal were not affected by the new lease; that the one third interest under the new lease was held in trust for Kuhn; and, stating an account, awarded a sum certain to Kuhn as his one third of the accrued production.
1. The court below having confirmed the reports of the master and decreed accordingly, the record, on appeal to the Supreme Court, showing that the proceeding involved questions of fact and account, merely, all of which had been satisfactorily adjusted by the master and court below, the decree was affirmed and the appeal dismissed.

Before PAXSON, C. J., STERRETT, GREEN, CLARK and MITCHELL, JJ.

No. 116 July Term 1888, and No. 3 January Term 1889, Sup. Ct.; court below, No. 16 September Term 1884, C. P. in Equity.

On June 18, 1884, John R. Kuhn filed a bill in equity against Joseph A. Weible, H. E. Brown, Titus S. Emery, George Sturgis, Hattie B. Davis, Jeremiah G. Shaw and The Anchor Oil Company, asserting an interest in an oil leasehold, and, upon the facts charged in relation thereto, praying that

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an injunction be granted restraining the defendants from destroying an original lease and the extension thereof, and any letters or telegrams relating thereto ; that any writing attempting to surrender the lease be given up and canceled ; that said lease be delivered to plaintiff, or to some person appointed by the court, for safe keeping ; that a certain lease from T. S. Emery, attorney in fact, to H. E. Brown, be delivered up and canceled ; and that plaintiff be at liberty to examine witnesses, etc., in perpetuum rei memoriam. A preliminary injunction was awarded, and afterwards, on motion, continued until further hearing.

On September 19, 1884, by leave of court, an amended bill was filed averring that said Weible and Brown were the trustees of the plaintiff as to the title to the leasehold and as to one third of the oil produced therefrom, and that no account had been taken of the production ; praying that the names of the National Transit Company and W. H. Dufur be added as defendants, and that the said National Transit Company and W. H. Dufur be enjoined from receiving one third of the oil produced ; that an account be taken, and that Weible and Brown be decreed trustees for the plaintiff as to the undivided one third of the leasehold.*

On February 9, 1885, a receiver was appointed to receive from the National Transit Company, all the oil which had accrued to the one third of the leasehold interest described in the plaintiff's bill, to settle the storage, shrinkage, etc., and to hold the oil until otherwise ordered by the court.

Answers having been filed and issue joined, on February 4, 1886, the cause was referred to *Mr. William Schnur*, as examiner and master, whose report showing the controversy, filed on December 6, 1886, was as follows :

By lease for oil purposes dated June 21, 1881, George Sturges, Hattie B. Davis and Jeremiah G. Shaw, by their attorney in fact, Titus S. Emery, leased to Geo. Marsh and John R. Kuhn 105 acres of land situate in Glade township, Warren county and state of Pennsylvania. The parties of the second

*Neither the bill, nor the amended bill, nor the answers, appeared in the paper books.

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part therein, covenanted "that within thirty days from the date thereof they will commence to drill and explore for petroleum, coal oil, rock or carbon oil, in and under the surface of the land hereinbefore described, and will prosecute such drilling and exploration with due diligence to success or abandonment," etc. This lease was for the term of fifteen years, at one eighth royalty on all wells producing ten barrels or less, and one fourth royalty on all wells producing over ten barrels per day. There are quite a number of covenants relating to the number of wells and other matters, but among others are the following, "And in event of discontinuing work for a period of sixty days, this lease shall be forfeited; and further, any failure to perform the covenants herein contained, shall, at the option of the said parties of the first part, work a forfeiture of this demise." Upon the termination of the lease from any cause, any attorney, at the request of the parties of the first part, might sign an agreement as attorney for second parties for entering in any competent court an amicable action of ejectment for said land.

No operations for oil had been conducted on this land up to August 4, 1883, at which time the lease was renewed to Kuhn and Marsh upon condition that second parties should, in good faith, commence active operations on the property within thirty days from the date of renewal, subject to the terms of the original lease. J. R. Kuhn paid the sum of fifty dollars for the renewal, which was sent by draft to Mr. Emery; J. A. Weible paid to G. W. Marsh, who went to Mr. Emery to get the renewal, the sum of eighty dollars for expenses.

On August 8, 1883, Kuhn and Marsh assigned to J. A. Weible a one third interest in said lease. Operations were commenced on said land during the month of August; a rig had been built and other things done, but while they were waiting for machinery a dry hole came in on the south side and another nearly dry on the north side of this lease. The well was not completed. Mr. Weible, defendant, says he favored putting a well on the north end of the lease. J. A. Weible then entered into negotiations with said Emery for a modification of the lease and saw said Emery personally in relation thereto, as will be seen from the following correspondence:

By letter dated March 15, 1884, Weible writes to T. S.

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Emery, from Warren, Pa. : "Dear Sir : When you were here last the outlook on your property was not encouraging, and after you left a dry hole on the edge adjoining you came in, and we abandoned the well without completing. I would like to move the rig to the extreme north end and drill as fast as the weather would permit and get everything moved before the roads break up ; but now, Mr. Emery, I think you should give me a chance at a straight eighth royalty."

To which said Emery replied from Philadelphia, March 17, 1884: "Dear Sir : Your letter of 15th inst., relating to the oil lease on the Shipman farm is before me. I am willing to modify the lease, as I advised Mr. Brown, the legal adviser of the owner of the land, but I see no good reason for reducing the royalty. If the property produces good wells the land owners ought to share the profits."

In the meantime other parties had become interested in the territory and were trying to negotiate for the land, as will be seen by a letter from said Emery, from Philadelphia, March 19, 1884 :

"MR. JOHN GALLOWAY, WARREN, PA. :

"Dear Sir : Your letter of the 17th inst., offering to lease the Shipman farm in my charge, for putting down an oil well, is before me. The Marsh and Weible lease has lapsed by their failure to perform their part of the contract ; but they have applied for another chance. I feel disposed to be liberal with them, if they want time and will go on in good faith ; if they do not at once come to terms, I will see what can be done for you."

On the same day said Emery writes to J. A. Weible from Philadelphia :

"Dear Sir : I have applications to lease the Shipman farm for oil wells, and as you have abandoned the operations and forfeited your lease, I should feel disposed to treat with them at once, had I not received your letter of the 15th, practically asking for a renewal, at least that was what I construed your letter to mean. Now, if you wish to renew, I shall expect you to agree to put down one well, in good faith, at once, and unless you do agree to that within a week I shall request Judge Brown to consider the new applications before me, and if either of them are reported to be responsible parties, I shall consider

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your lease abandoned and will then be prepared to open new negotiations with other parties."

On March 21, 1884, the following telegram was sent to Mr. Emery:

"On receipt of your first letter, ordered new rig on north end and men at work, which will be completed and drilled as fast as weather will permit. J. A. WEIBLE."

Thereupon, on March 22, 1884, Mr. Emery writes to John Galloway, to whom he had written the letter of March 19, 1884:

"Dear Sir: Your letter of 21st inst., relating to the proposed lease of the Shipman farm for oil wells is received. I also received a dispatch from Mr. Weible advising me that on the receipt of my letter, a few days since, he ordered a new rig on north end and men at work, which will be completed and drilled as fast as weather will permit. If he goes on in good faith, I am disposed to give him a fair show. Should he again fail to proceed according to contract, I shall declare his lease forfeited, and in that case will be ready to consider new proposals. I have had other proposals than yours to lease the property, but have given terms to no one."

George W. Marsh, at some time after the first well was abandoned, sold his interest in said lease to J. A. Weible; so that the interests in said lease when the second well was commenced stood in J. R. Kuhn one third, and J. A. Weible two thirds.

J. A. Weible testifies that on "March 21, 1884, I told him (Kuhn) I was going to try to get a new lease, and we would have to act quick. I asked him if he wanted to take a third interest with me. He said yes. Kuhn was to pay one third and I two thirds."

The rig of the second well was put up and operations commenced during the latter part of March, under the direction of G. W. Marsh, for Kuhn and Weible.

About this time another oil well was put down on property in the vicinity of this lease by J. A. Gartlan. The oil sand in the Gartlan well was struck on May 5, 1884, and the well was opened on May 9, 1884. Mr. Gartlan says that he, in conversation with Weible, told him that he believed that he had a good well. Said Gartlan further says, "I think there was a conversation between Weible and myself that whoever got his

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well down first would give the other information, but I am not clear in my recollection about it." The conversation between Weible and Gartlan, when Gartlan told Weible that he believed he had a good well, occurred, according to Gartlan's testimony, on the 5th of May. Between May 5 and 9, 1884, J. A. Weible sent H. E. Brown, Esq., one of the firm of Brown & Stone, attorneys, to see Mr. Emery to get a new lease. Mr. Brown went as the agent of Mr. Weible, as shown by the testimony. When Mr. Brown saw Mr. Emery, he (Emery) asked said Brown if there was any question about the lease being forfeited, having reference to the lease theretofore made to Kuhn and Marsh, and afterward extended and referred to in the correspondence between said Emery and said Weible, and said Emery refused to give a new lease till the old one was surrendered. Mr. Brown thereupon told said Emery that the old lease had been forfeited, whereupon the old lease was delivered up and canceled, and the said Emery made a new lease to H. E. Brown, Esq., dated May 9, 1884. About May 12, 1884, the said H. E. Brown, Esq., assigned the one half interest in said lease to J. A. Cadwallader and E. F. Johnson, which interest is now held by the Anchor Oil Company, and on the same date said H. E. Brown assigned the other one half interest in said lease to J. A. Weible. The consideration money for the one half interest assigned by said Brown to said Cadwallader and said Johnson, was paid to Weible and not to said Brown. And said Brown, in answer to the interrogatories filed by plaintiff, says: "At the same time I made the assignment mentioned, i. e. to Cadwallader and Johnson, I also assigned the other undivided one half to J. A. Weible. He paid my expenses, and for my time, and agreed to pay a sum to be fixed by himself if the property should prove productive."

The oil well on this lease put down struck oil in paying quantities about May 31, 1884.

The plaintiff filed his bill, and amended bill, in which he in substance alleges that he, Kuhn, was tenant in common with Weible in said lease and renewals; that the surrender of said lease and rights thereunder by H. E. Brown was fraudulent and void; that if said Brown acquired any rights to the lease of May 9, 1884, he and others to whom it was assigned with notice of plaintiff's rights, are trustees simply of Kuhn's inter-

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est, and prays for relief as shown by the several bills. Defendant Weible's answer sets up a denial of plaintiff's right, and claims that the original lease was forfeited and the renewals thereof abandoned; that H. E. Brown procured the lease of May 9, 1884, for himself, Brown; that he, Weible, acquired his rights to the leasehold from said H. E. Brown.

Interrogatories were also filed and served for discovery to which defendants made answer.

Your master has given careful consideration to the bills, answers, interrogatories and the answers thereto and the evidence in this case. The first question presented is, did Kuhn have any interest in this leasehold? If so, when and how was that interest divested?

* * * * *

From all the facts and the law applied thereto, your master is of opinion that Kuhn's interest in said original lease and renewals was good and valid up to the date of the new lease to H. E. Brown. How, then, did the new lease to H. E. Brown affect Kuhn's interest?

H. E. Brown, in his answer to the interrogatories served on him, claims that he got the lease for himself. Is this tenable? Mr. Emery says that he made the lease to H. E. Brown, personally. Mr. Emery, so far as shown by the testimony, is probably sincere. The original lease and correspondence and papers relating thereto were in the possession of Weible. H. E. Brown got the papers from Weible; he was sent with the papers to see Mr. Emery for Weible; Weible paid him his expenses and time in seeing Mr. Emery, and was to pay Brown a sum to be fixed by Weible in case the well proved good. Brown a few days after May 9, 1884, assigns to Weible the one half interest without further consideration; at the same time Brown assigned the remaining half in the new lease to Cadwallader and Johnson, and the consideration therefor was paid to Weible.

From all these facts your master is of the opinion and so finds that H. E. Brown in procuring the lease of Mr. Emery dated May 9, 1884, was the agent of J. A. Weible, and that Kuhn's rights under the original lease and renewals were not affected thereby, and that J. A. Weible as to the one third interest of Kuhn held the same in trust for Kuhn.

Defendant's counsel, Brown & Stone, raise the question that

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the plaintiff's bill is an ejectment bill and cannot be maintained ; that the title being in dispute should be first determined by an action at law.

After due examination of the authorities cited by counsel, and from the fact that your honors have exercised jurisdiction of this cause in granting an injunction to preserve the title papers and evidence of plaintiff from destruction, and overruling the demurrer to plaintiff's interrogatories for discovery, your master is of the opinion that the plaintiff's bill rightly lies in equity. The dispute is not altogether one of possession ; so far as that arises, as hereinbefore stated, Marsh went into possession as superintendent, or to take care of the well for Kuhn and Weible, and nothing occurred afterward by which that state of facts was changed by Kuhn or Weible. The evidence disclosed a state of facts which, in the opinion of your master, would be a fraud upon the rights of plaintiff if permitted to stand. The plaintiff's bill, among other things, asks to preserve plaintiff's title papers and prevent their destruction ; to perpetuate the evidence thereof, for a discovery, etc., of all which equity has jurisdiction ; and it seems well settled that if a court of equity once acquires jurisdiction, it will dispose of every subject of dispute, whether it be one of remedy or of distinct, yet connected topics of dispute.

The question of notice to the Anchor Oil Company of the plaintiff's right to make it trustee with Weible, your master thinks immaterial, because Mr. Weible still has, so far as shown, interest enough, to wit: one half, to make good to Kuhn the one third interest of which Weible is trustee. So far as the interest of W. H. Dufur in this controversy is concerned, it was admitted upon the hearing of this cause by W. G. Trunkey, Esq., that Dufur had no other or greater right than said Weible, and that said Dufur stood in said Weible's shoes.

Your master, therefore, recommends under the view taken that the lease of May 9, 1884, was taken in trust for Kuhn as to the one third, that the court decree :

1. That the said J. A. Weible convey, as the court may direct, to J. F. Kuhn the two thirds of the one half interest now held by said Weible in the lease from Titus S. Emery, attorney in fact for George Sturges, Hattie B. Davis and Jeremiah G. Shaw, dated May 9, 1884, for the land therein mentioned, which is equal to the one third interest in said lease.

Master's Report.

2. That if not already recorded, that said Weible deliver said lease dated May 9, 1884, to W. J. Alexander, recorder of deeds for Warren county, or some disinterested person as the court may direct, for custody or record.

3. That said J. A. Weible account to plaintiff for the oil taken from said leasehold and the expenses thereof, that the same may be divided according to the respective proportions or interests.

To the foregoing report various exceptions chiefly relating to findings of fact, filed by the defendants, were overruled by the master. The exceptions being renewed upon the filing of the report, they were dismissed by the court, BROWN, P. J., without opinion filed, and the master's report confirmed, the defendant Weible to pay the costs from the funds going to him in the hands of the receiver.

Thereupon, the master, who was also the receiver appointed by the order of February 9, 1885, stated and reported an account and recommended the following order and decree :

That the said J. A. Weible pay to J. R. Kuhn the sum of \$6,878.24, together with any interest that may have accrued thereon in the hands of the receiver, and that J. A. Weible pay the costs of this accounting.⁶

Exceptions filed to the foregoing final report by both the plaintiff and the defendants were dismissed by the court, BROWN, P. J., May 19, 1888, without opinion filed, the account stated confirmed, and a final decree entered as above recommended by the master.⁶

Thereupon the defendants took this appeal and certiorari, specifying that the court erred:

1. In not finding that the original lease of June 21, 1881, and its renewal of August 4, 1883, were forfeited.

2. In finding from the letters and telegrams between Weible and Emery, in substance, that the forfeiture of the lease of June 21, 1881, and its renewal of August 4, 1883, were waived, and the original lease and renewal reinstated in March, 1884.

3. In taking into consideration in finding the forfeiture waived, the letters from Emery to Galloway.

4. In finding that H. E. Brown took the lease of May 4, 1884, for Weible and Kuhn.

Syllabus.

5. In finding that there was an arrangement between Kuhn and Weible by which Kuhn acquired any interest, other than such interest as he had in the original lease of June 21, 1881, and its renewal of August 4, 1883.

6. In entering the final decree of May 19, 1888.⁶

Mr. W. E. Rice (with him *Mr. R. Brown, Mr. C. W. Stone* and *Mr. W. G. Trunkey*), for the appellants.

Mr. Charles H. Noyes (with him *Mr. Watson D. Hinckley*), for the appellee.

PER CURIAM:

This was a bill in equity in the court below and comes here upon appeal, with a writ of certiorari to bring up the record. It involves questions of fact and account merely, all of which have been satisfactorily adjusted by the master and court below. We are not required to pass upon any question of law, and a discussion of the facts and the items of an account, would be as uninteresting as it would be useless.

The decree is affirmed and the appeal dismissed at the costs of the appellants.

GEO. BUSH ET AL v. W. J. GAMBLE ET AL.

ERROR TO THE COURT OF COMMON PLEAS OF WARREN COUNTY.

127	43
164	121
127	43
193	59

Argued May 10, 1889—Decided May 27, 1889.

[To be reported.]

1. In trespass for cutting and converting timber trees, under § 3, act of March 27, 1824, 8 Sm. L. 283, where the plaintiffs show title only to the undivided three fourths of the land in question, and the defendants are in possession of the remaining one fourth, claiming title thereto though under a defective title, the parties must be regarded as tenants in common.
2. The record of an ejectment wherein plaintiffs had recovered against

Statement of Facts.

the defendants the undivided three fourths of the premises, with the writ of habere facias and the return, established their actual possession of the recovery at the time the action in trespass was brought, and their right of possession and title when the writ of ejectment issued.

3. Though by § 2, act of May 4, 1869, P. L. 1251, a tenant in common may have against his co-tenant the same remedy as against a stranger, for the cutting and conversion of timber trees without his consent, yet that act does not authorize in his favor the penalty of double or treble damages provided by the act of March 27, 1824: *Wheeler v. Carpenter*, 107 Pa. 271.

Before PAXSON, C. J., STERRETT, GREEN, CLARK and MITCHELL, JJ.

No. 5 January Term 1889, Sup. Ct.; court below, No. 61 February Term 1887, C. P.

On February 4, 1887, Wm. J. Gamble and others, heirs at law of W. B. Bingham, deceased, and George W. Porter and others, heirs at law of William Porter, deceased, brought trespass q. c. f. against George Bush, Frank Skiff and John McKinney, to recover double and treble damages for the cutting and conversion of timber trees, under § 3, act of March 27, 1824, 8 Sm. L. 283. The defendants pleaded not guilty.

At the trial on May 17, 1888, the plaintiffs put in evidence the record of an action of ejectment brought on December 6, 1882, to No. 15 March Term 1883, by the same plaintiffs against the same defendants, wherein the plaintiffs, upon a title three fourths in them and one fourth in one John Dick, as they showed it, had a verdict and judgment in their favor for an undivided three fourths of the land then in dispute, which embraced the land upon which the trespass complained of in this suit was committed; the record also showing that the plaintiffs had been put in possession of the recovery by a writ of habere facias possessionem. The plaintiffs then adduced evidence as to the value of the timber cut and converted by the defendants in 1881 and afterward while they owned the interest recovered by them in the ejectment, and rested.

The defendants put in evidence a treasurer's deed on a tax sale of the tract, to D. H. Mitchell, dated June 8, 1868, and mesne conveyances from Mitchell to the defendants. To meet this defence, the plaintiffs, in rebuttal, adduced evidence that the taxes upon which the sale to Mitchell had been made were paid before the sale.

Charge of Court below.

The defendants asked the court to charge :

1. That the plaintiffs, having brought a suit at common law in trespass *quare clausum fregit*, the ejectment has no effect in determining the liability, and there can be no recovery, as the defendants were in possession of the property at the time the timber was taken.¹

The court, BROWN P. J., answered the foregoing point in the negative, and charged the jury as follows :

It is a conceded fact, that in 1852, one A. H. Ludlow acquired title to the land in suit by a treasurer's sale of the same, for the non-payment of the unseated taxes of 1850 and 1851 ; and it is an undisputed fact, that by sundry conveyances, the title that Ludlow thus acquired became vested in the plaintiffs, before the cutting of the timber for which this suit is brought. We say to you, that the plaintiffs were the owners of the three fourths of the land, during the time of the trespass complained of, unless such title was divested by a treasurer's sale made to one D. H. Mitchell in 1868 ; and we further say to you, that even if the plaintiffs' title was divested by the treasurer's sale to Mitchell, they are still entitled to a verdict for the timber cut between December 6, 1882, and May 20, 1886. I repeat, that whether you do or do not find the plaintiffs' title divested by the treasurer's sale of 1868, you should find a verdict in the plaintiffs' favor for the value of the timber cut between December 6, 1882, and May 20, 1886. The reason for this is, that on December 6, 1882, these plaintiffs brought an action of ejectment against the defendants, and recovered, and possession was obtained by the plaintiffs on May 20, 1886, and that is conclusive of the right of the plaintiffs to recover between those dates. We further say, that you should also find a verdict for the plaintiffs for all the timber cut by defendants, between February 4, 1881, which was six years before the bringing of this suit, and December 6, 1882, the date of the bringing of the ejectment suit, if you find that their title was not divested by the treasurer's sale of 1868 ; but if their title was divested by that sale, under the instruction we shall give you, then you will not allow the plaintiffs anything for what was cut between February 4, 1881, and December 6, 1882.

This brings us to the question, Was the treasurer's sale to Mitchell in 1868 good ? There seems to be no question but

Charge of Court below.

what the land sold by the treasurer to Mitchell in 1868, for the unseated taxes of 1866 and 1867, is the land in dispute, and the same which the plaintiffs, or their predecessors in the title, were the owners of the three fourths part before such sale; and, if the uncontradicted evidence on the part of the defendants is believed, there can be no question that the land thus sold to Mitchell was in such a situation and had been so severed from the balance of the tract, as to be subject to assessment and sale as unseated land. Was the treasurer's sale to Mitchell good to vest a title in him, is the question to which your attention is directed, because the answer to that question will determine whether you will allow the plaintiffs anything for the cutting between February 4, 1881, and December 6, 1882. On the part of the plaintiffs, it is claimed that such sale to Mitchell was not good, because, they say, that before the sale the taxes on the land had been paid by Mr. Porter and Mr. Gamble through Mr. Benedict. We say to you, if you find, from the evidence, that such was the fact, then the sale to Mitchell was worthless, and the defendant's title will not avail them, and the plaintiffs will be entitled to a verdict, not only for the cutting between December 6, 1882, and May 20, 1886, but for the cutting between February 4, 1881, and December 6, 1882. What we say, in fewer words is, that if before the treasurer's sale to Mitchell, the taxes were paid, then the sale was void.

* * * * *

In order to aid you in the verdict you shall render, we have put these questions, and you will be permitted to take them, if there is no objection. These questions then are to be answered by you in your verdict.

1. What was the value of the three fourths of the timber cut down and taken away by the defendants between February 4, 1881, and December 6, 1882, in the tree?

2. What was the value of the three fourths of the timber cut down by the defendants between the dates before mentioned and which was left on the ground?

3. What was the value of the three fourths of the timber cut by the defendants and taken away, between December 6, 1882, and May 20, 1886?

4. What was the value of the three fourths of the timber cut down by the defendants between December 6, 1882, and May 20, 1886?

Arguments.

5. Was the title of the plaintiffs to the land in suit divested by the treasurer's sale to D. H. Mitchell in 1868, given in evidence by the defendants?

The jury returned a verdict for the plaintiffs for \$839.07, "made up as follows: In single damages; value of $\frac{1}{4}$ of the timber cut and taken away by defendants between February 4, 1881, and December 6, 1882, \$66.75; value of $\frac{1}{4}$ of the timber cut by defendants and left on the ground, between above dates, \$10.00; value of $\frac{1}{4}$ timber cut and taken away by defendants between December 6, 1882, and May 20, 1886, \$712.32; value of $\frac{1}{4}$ the timber cut and left on the ground by defendants between above dates, \$50.00; and further that the plaintiffs' title to the $\frac{1}{4}$ of the land in this suit was not divested by the treasurer's sale to D. H. Mitchell, in 1868."

The plaintiffs then moved for judgment in double the damages found by the jury for timber cut down and left, and in treble the damages found for the timber cut down and removed. On July 23, 1888, the court made absolute the rule granted on said motion and ordered that judgment be entered in favor of the plaintiffs for \$2,457.21.²

Judgment having been entered as directed, the defendants took this writ, assigning for error:

1. The answer to the defendants' point.¹
2. The order entering judgment, as stated.²

Mr. W. E. Rice (with him *Mr. R. Brown* and *Mr. Charles W. Stone*), for the plaintiffs in error:

1. There is no rule which authorizes doubling 'and trebling the damages in an action for mesne profits succeeding or ancillary to an action of ejectment. The action for mesne profits is really for use and occupation: *Blight v. Ewing*, 26 Pa. 135, and necessarily involves a settlement of an account: *Ewalt v. Gray*, 6 W. 427. The plaintiff cannot recover exemplary damages beyond the actual rent of the premises or some other fixed standard: *Hanna v. Phillips*, 1 Gr. 254. Compensation is the measure of damages: *Morrison v. Robinson*, 31 Pa. 456.

2. The defendants' point should have been affirmed, and the evidence of the record in the ejectment rejected, or what is the same thing, excluded from the consideration of the jury.

Arguments.

Woodward v. Tudor, 81* Pa. 382, is exactly in point. The plaintiffs showed title to only the undivided three fourths of the premises from which the timber was cut and taken. The other undivided one fourth was presumed to be in the defendants, and they would stand in the relation of tenants in common with the plaintiffs. The case of Wheeler v. Carpenter, 107 Pa. 271, flatly rules that one tenant in common cannot recover against his co-tenant treble damages in an action of trespass quare clausum fregit.

Mr. Charles H. Noyes (with him *Mr. Wetmore, Mr. Hinckley, Mr. Tyler* and *Mr. Hallock*), for the defendants in error:

1. The defendants seem to suppose that the effect of the judgment in ejectment is limited to an action of trespass, in which the damages claimed are for the use and occupation merely. But the action for mesne profits, so called, is nothing more and nothing less than an action of trespass quare clausum fregit, in which the plaintiff claims not only damages for injuries to his land, but compensation for being wrongfully deprived of possession: *Huston v. Wickersham*, 2 W. & S. 308; *Morrison v. Robinson*, 31 Pa. 456.

2. The judgment in a former ejectment is conclusive, merely because all judgments are conclusive of the matters adjudicated, and the matter adjudicated in an ejectment is the right of the plaintiff to the possession of the land at the teste of the writ, and that the defendant wrongfully kept him out of it: *Osbourn v. Osbourn*, 11 S. & R. 55; *Man v. Drexel*, 2 Pa. 202; *Drexel v. Man*, 2 Pa. 519. Whether the record of the ejectment established the plaintiffs' right to double or treble damages, is another question which cannot arise here, because the plaintiffs established their ownership by other evidence.

3. *Woodward v. Tudor*, 81* Pa. 382, is misunderstood. That case decides that trespass will not lie against one who at the time of suit brought is in actual possession, for the reason that ejectment is the proper remedy. But, as was said in *Carran v. Beam*, 88 Pa. 323, "When a plaintiff has recovered his possession, by ejectment or otherwise, that possession by operation of law relates back to the time when he was excluded, and hence all acts done on the premises by those who have kept him out, are to be regarded as ordinary intrusions on his pos-

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session." No presumption that the plaintiffs and defendants are tenants in common can possibly arise. The plaintiffs showed title to themselves in three fourths and in John Dick for the other fourth. The defendants set up an adverse title which was wholly defeated.

OPINION, MR. JUSTICE CLARK:

This is an action of trespass *quare clausum fregit*, for cutting, and for cutting, carrying away, and converting timber trees; the claim is for double and treble damages under the third section of the act of March 27, 1824, 8 Sm. L. 288. At the trial, the plaintiffs offered in evidence the record of an action of ejectment, in which they had recovered, as against the defendants, the undivided three fourths of the premises in question, with the writ of *habere facias* issued thereon, and the return; and thus established their actual possession at the time this suit was brought, and their right of possession and title when the writ of ejectment issued.

Although the testimony is not all printed, it appears from the paper books, and it is not denied, that the plaintiffs then gave in evidence their title according to the abstract filed in the ejectment. The defendants in reply gave in evidence the tax deed to Mitchell; and the plaintiffs in rebuttal proved the payment of the taxes before the treasurer's sale. The plaintiffs thereby not only re-established their right to the undivided three fourths of the land which they had recovered in the ejectment, but exhibited their right to recover damages beyond the teste of the writ of ejectment: *Osborn v. Osborn*, 11 S. & R. 55; *Huston v. Wickersham*, 2 W. & S. 308.

But the plaintiffs only established title to three fourths of the land, and they were admittedly in possession only to that extent. Not only the judgment in the ejectment, but the teste papers, plainly disclosed the fact that the plaintiffs' title covered nothing beyond this undivided interest in the land; and, the defendants being in possession of the remaining one fourth, claiming title thereto, we cannot see how the parties can be regarded otherwise than as tenants in common. It is true the testimony disclosed facts which would or might wholly invalidate the treasurer's deed, under which the defendants claimed title, but the burden of proof was upon the plaintiffs: they

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were entitled to recover on the strength of their own title; and, as they established their right only to the undivided three fourths of the land, the defendants were not called upon to exhibit their title to the remaining one fourth; non constat that they did not have a conveyance from John Dick for this outstanding interest. The parties held the lands by several and distinct titles, but occupied them in common: the only unity recognized between tenants in common is that of possession, and we are of opinion that the plaintiffs and the defendants must, in this case, be assumed to bear that relation in the ownership of this land.

At the common law, trespass was not recognized as a remedy between tenants in common, except when mesne profits, strictly so called, were sought to be recovered, or there had been an actual ouster from, or destruction of the property: *Bennet v. Bullock*, 35 Pa. 364; *Filbert v. Hoff*, 42 Pa. 97; *Lane v. Harrold*, 72 Pa. 267.

But by the second section of the act of May 4, 1869, P. L. 1251, it was provided, that in case of the cutting or removal of timber trees, by one or more tenants in common, without the consent of all the co-tenants, "the parties injured shall have every remedy in law and equity for the recovery of the said timber trees," etc., "and also for the recovery of damages for the cutting or removing of the same, which they now have against an entire stranger to the title." As it cannot be doubted that an action of trespass would have been sustainable for the injury complained of, in this case, against a stranger to the title, it is plain that under the provisions of this act of assembly the plaintiffs have a right to the same remedy. If in any given case, trover, trespass, or replevin might be sustained against a stranger, the same remedy is available to a tenant in common in a like case against his co-tenant, or against any other person acting for or under him; but it does not follow, for the act of assembly does not so provide, that the recovery may be to the same extent. Indeed, it has been expressly held in *Wheeler v. Carpenter*, 107 Pa. 271, that the penalty provided by the act of March 27, 1824, was not extended by the act of May 4, 1869, to an action by one tenant in common against his co-tenant, for unauthorized cutting and conversion of timber trees.

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Whether, therefore, this be treated as an action of trespass *quare clausum fregit*, or an action for mesne profits, compensation is the measure of the plaintiffs' recovery; that is to say, three fourths of the value of the timber. We are of opinion that judgment should have been entered on the verdict for single damages only.

The judgment is reversed, and judgment is now entered on the verdict for \$839.07, with interest from May 17, 1888, and costs.

O. C. ALLEN v. FIRST N. BANK.

ERROR TO THE COURT OF COMMON PLEAS OF WARREN COUNTY.

Argued May 10, 1889—Decided May 27, 1889.

[To be reported.]

1. The cashier of a national bank, holding the paper of a firm of which the cashier is a member, has no power to bind the bank by an agreement that there shall be no liability upon an accommodation note procured by him to be substituted, for a special purpose, for the indebtedness of his firm.
2. Nor may the accommodation maker defend upon the ground that his note was procured by the cashier, a member of such debtor firm, to cover up from the bank examiner, by such substitution, the fact that the bank had loaned to the firm in excess of ten per cent of its capital stock.
3. It is no defence to the maker of an accommodation note discounted by a bank, that the bank had discounted paper of another person or firm to an amount exceeding the one tenth of its capital: *O'Hare v. Second N. Bank*, 77 Pa. 96; *Mapes v. Second N. Bank*, 80 Pa. 163.

Before PAXSON, C. J., STERRETT, GREEN, CLARK and MITCHELL, JJ.

No. 310 January Term 1889, Sup. Ct.; court below, No. 46 December Term 1887, C. P.

On October 27, 1887, the First National Bank of Warren

Statement of Facts.

brought assumpsit against O. C. Allen, to recover on a note made by the defendant dated November 5, 1886, for \$5,000, payable at three months at the First National Bank of Warren, to the order of Beecher & Copeland, and by Beecher & Copeland indorsed. The defendant pleaded, non-assumpsit.

At the trial on October 5, 1888, the plaintiff proved the note, put it in evidence, and rested.

The defendant, O. C. Allen, was then called in his own behalf, and testified that on a certain date in 1884, he saw Mr. Beecher, the cashier of the plaintiff bank, at the Warren post-office, the witness then being postmaster:

Q. What did he come to see you about?

Defendant's counsel proposes to prove, by the witness, that on November 5, 1884, Mr. Beecher called on the defendant, at the post-office in Warren, and informed him, in substance, that the First National Bank of Warren was carrying for the firm of Beecher & Copeland a quantity of oil certificates, in excess, as he stated, of what they were permitted to carry for one firm under the laws of the United States, and that the bank desired to have that oil divided up among other parties, or carried in the name of other parties, so as to make an appearance of compliance with the law; and for that purpose he asked the defendant to become a maker of a note for \$5,000, to be secured by 5000 barrels of the oil that the bank was carrying for Beecher & Copeland; and in compliance with this request, and without other consideration, Mr. Allen executed the note and delivered it to Mr. Beecher, and it was placed in the bank, with the oil as its collateral security, with the express agreement that Mr. Allen should not be liable for the note; to be followed by evidence that this note is the second or third renewal of that note, and with the same conditions and considerations, and with the same agreement that there should be no liability on the part of Mr. Allen.

Objected to, because there is no authority shown or offered to be shown in the cashier to make any such agreement for the bank; and that the agreement proposed to be shown would not be binding upon the bank, in any event; that the agreement is not within the ordinary powers of the cashier to make, and no special authority is proposed to be shown; that such an agreement, if made by due authority of all the directors,

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would be void as against the stockholders, being in fraud of their rights; and that the whole evidence does not tend to show any legal defence to the note in suit, and is therefore incompetent and irrelevant; also, that the evidence proposed to be given tends to defeat and destroy a written instrument by verbal testimony, and is therefore incompetent.

Defendant's counsel adds to the proposition as follows: To be followed also by evidence, that at the date of said agreement the plaintiff bank held the obligation of Beecher & Copeland for said \$5,000, secured by said oil certificates, and still holds said obligation and oil certificates.

Plaintiff's counsel objects to the offer as amended, for the reason that the whole evidence offered to be given does not tend to establish a defence on the part of this defendant; the contract or agreement not having been made with the bank by any officer authorized to make it, because there is no authority offered to be shown in the cashier to make such an agreement, and that the same was not within his ordinary powers, as cashier; that the agreement itself, if made for the bank and by due authority, would be void under the circumstances stated, and would not avail as a defence to the defendant; and that the evidence is incompetent, as tending to contradict the written instrument upon which the suit is brought.

Objection sustained, offer refused; exception.¹

Defendant proposes to prove by this witness, and others, that the note offered in evidence by the plaintiff, was given for an antecedent debt of Beecher & Copeland to the said bank, and was without consideration; to be followed by evidence that the plaintiff bank, in this case, paid no consideration for said note.

Objected to, as incompetent and irrelevant, in this issue; the proposition itself showing that the note was given upon a good consideration, that is to say, the antecedent debt of Beecher & Copeland.

Objection sustained, offer refused; exception.²

Defendant proposes to prove by this witness and others, that the plaintiff bank, had, previous to the making by defendant of the note of which the note in this case is a renewal, discounted paper for Beecher & Copeland, for an amount of more than one tenth part of the capital stock of said bank, and

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had in that manner violated § 5200, Revised Statutes of the United States; and that the original note given by the defendant, as well as all the renewals of the same, and including the note offered by the plaintiff in this case, was given without consideration, and for the express purpose of deceiving the bank examiner as to the true condition of said plaintiff bank, and to avoid the consequences of the violation of said United States laws. The purpose of the offer is to show that the note in question was given for the purpose of screening the bank from the violation of the law which they had committed in that respect, and was illegal and void.

Objected to, as incompetent and irrelevant, because the facts stated would not avail as a defence in this case, as against the bank.

Objection sustained, offer refused; exception.³

Defendant offers in evidence the propositions above made, as one proposition, to be followed by evidence that the original note was given about November, 1884, and renewed from time to time under the same agreement under which the first note, of which the note in question was a renewal, was made, to wit: that it was for the purpose of deceiving the bank examiner as to the violation of said United States laws, and with the express agreement that there should be no liability whatever on the part of said defendant, O. C. Allen; this for the purpose of showing acquiescence and ratification in this arrangement by the bank, of the agreement.

Objected to, for the reasons given in the objections to the first offer made by the defendant.

Objection sustained, offer refused; exception.⁴

M. Beecher, called for defendant, testified that he was the cashier of the plaintiff bank, and was a member of the firm of Beecher & Copeland; that the first note signed by defendant Allen, of which the note in suit was a renewal note, was given September 9, 1884. An offer to show by this witness the facts set out in the preceding offers being refused, the witness was then examined as to the number and dates of the renewals of the note of September 9, 1884, and the discounts charged on each, his testimony showing that the discounts had not exceeded the rate of 6 per cent.

Arguments.

The court, BROWN, P. J., charged the jury as follows:

The court assumes the responsibility of determining this case, for the present, at least.

The plaintiff requests us to say to you, that there is no sufficient evidence that any interest in excess of the legal rate was ever taken, charged, received or reserved by the plaintiff upon the note in suit, or any previous note of the defendant of which it is a renewal, and the verdict should be for the plaintiff for the amount of the note with legal interest from its maturity.

Answer: This point is affirmed.⁶

We say to you, the case depends upon certain questions of law, that we desire, inasmuch as the matter is important to both sides, to more fully examine; and we take the responsibility, so far as you are concerned, of instructing you that the verdict should be for the plaintiff for the amount of the note, with the interest to this date.⁵

The jury returned a verdict for the plaintiff for \$5,580.83. A rule for a new trial having been discharged, the defendant took this writ, assigning as error:

- 1-4. The refusal of defendant's offers.^{1 to 4}
5. The direction to find for the plaintiff.⁵
6. The answer to the plaintiff's point.⁶

Mr. Charles Dinsmoor and Mr. W. W. Wilbur (with them Mr. Geo. H. Higgins), for the plaintiff in error:

1. It is urged that the defendant was entitled to the evidence rejected, under the authority of *Cake v. Pottsville Bank*, 116 Pa. 264. The plaintiff bank is not an innocent holder who discounted or purchased for value; neither is the defendant an accommodation maker, for the purpose of enabling Beecher & Copeland to obtain money on the note. The bank gives no consideration whatever for the note, gives up no security it holds for the indebtedness the note was given for, but still holds Beecher & Copeland's note and the oil they pledged to the bank for its security. We therefore submit that under the ruling of the case cited, the offers of evidence should have been admitted. The same rulings are found in *Maynard v. Sixth N. Bank*, 98 Pa. 250; *Liggett's App.*, 111 Pa. 298.

2. The evidence that the note, for which the note in suit was

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a renewal, was given for the special purpose of being substituted for a note the bank had discounted for Beecher & Copeland, in order to deceive the bank examiner, together with the fact that the debt for which the note was to be substituted was a pre-existing debt, and that there was no consideration and no value given for the note by the bank, was admissible as a defence to the defendant's liability: *Carpenter v. National B. of the Republic*, 106 Pa. 170. Moreover, the paper must have been discounted by the directors of the bank, for the function of discounting commercial paper is theirs, and they cannot delegate it to a single individual or officer: *Morse on Banks*, 90, 92; *Bank of U. S. v. Dunn*, 6 Pet. 51; *Bank of Metropolis v. Jones*, 8 Pet. 12. The offence of the bank in discounting commercial paper for the single firm of Beecher & Copeland, to an amount largely exceeding that permitted by the law affecting national banks, rendered the note a void contract, and a court of justice will decline its aid to enforce it: *Coppell v. Hall*, 7 Wall. 542; *Mitchell v. Smith*, 1 Binn. 110; *Bredin's App.*, 92 Pa. 241; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. 173; *Fowler v. Scully*, 72 Pa. 456; *Maybin v. Coulon*, 4 Dall. 298; *Seidenbender v. Charles*, 4 S. & R. 150.

3. In attempting to distinguish this case from *Cake v. Pottsville Bank*, 116 Pa. 264, it was said that in our offer of testimony as to the acts of Beecher in procuring the signature of defendant to the notes, we made no offer to prove that he was acting within the range, or even within the apparent range, of the ordinary power and authority of a cashier. Such proof was not necessary. If one party be not bound by the agent's undertaking, neither is the other: *Pittsb. etc. R. Co. v. Stewart*, 41 Pa. 54. "In this respect, a corporation differs nothing from a natural person; if it would enforce the contracts of its agents, it must first agree to be bound by them:" *Caley v. Railroad Co.*, 80 Pa. 363; *Keough v. Leslie*, 92 Pa. 424. A bank cashier is considered the executive officer, through whom and by whom the whole moneyed operations of the bank, in paying or receiving debts, or discharging and transferring securities, are to be conducted: *Fleckner v. Bank of U. S.*, 8 Wheat. 338; *City Bank v. Perkins*, 29 N. Y. 554 (86 Am. Dec. 332); *Story on Agency*, § 114; *Cochecho N. Bank v. Haskell*, 51 N. H. 116 (12 Am. Rep. 68). Beecher, therefore, was acting within the

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range of his power and duties as cashier, in making the arrangement with the defendant.

Mr. Charles H. Noyes (with him *Mr. W. D. Hinckley, Mr. R. Brown, Mr. Charles W. Stone* and *Mr. W. E. Rice*), for the defendant in error :

1. If it is contended that the arrangement set up in this case was within the ordinary powers of the cashier of a national bank, it must be established as the law that a cashier, who is also a debtor of the bank, may procure the making or indorsing of a note for his own accommodation, by an agreement binding upon the bank that there shall be no liability upon the note. It is not the duty of a cashier to make such agreements, nor has he the power to bind his bank, except in the discharge of his ordinary duties: *Minor v. Mechanics' Bank*, 1 Pet. 46; *Bank of U. S. v. Dunn*, 6 Pet. 55; *Bank of Metropolis v. Jones*, 8 Pet. 12; *Hackney v. Insurance Co.*, 4 Pa. 185; *Stewart v. Huntingdon Bank*, 11 S. & R. 267; *Custar v. Gas & Water Co.*, 63 Pa. 381; *Mapes v. Second N. Bank*, 80 Pa. 163; *West St. L. Sav. Bank v. Shawnee etc. Bank*, 95 U.S. 557. The principles followed in these cases are controlling in the present case.

2. It was no part of the duty of the cashier to procure the note in suit. The making of the note by Allen, at the request of Beecher, was one thing; the acceptance of the note by the bank in lieu of, or as collateral security for the Beecher & Copeland paper, was another. The conversation between Beecher and the defendant at the making of the note, cannot by any *legerde-main* be transformed into an agreement by the bank. The bank never had any dealing with Mr. Allen at all. It took his note, but nothing more. The agreement if made, was one which no single officer had a right to make, and which, if made by the cashier for his own benefit and relief, without the knowledge of the directors, was a fraud upon the stockholders. It is not the case of an adjustment of a past due debt, with a view to its collection, as was *Cake v. Pottsville Bank*, 116 Pa. 264, but a substitution of the note of Allen for the note of Beecher & Copeland.

3. It is true that one who takes a note to secure an antecedent debt, and without other consideration, is not a holder for value, in the sense that he may recover against maker and in-

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dorser regardless of all circumstances; but the cases recognize the doctrine that the maker of accommodation paper cannot set up want of consideration against the holder, even though it is only held as a pledge for an antecedent debt; and this is expressly held in *Maynard v. Sixth N. Bank*, 98 Pa. 253; and *Stephens v. Monongahela N. Bank*, 88 Pa. 157. The argument that the court was in error in refusing to allow the defendant to prove that the loans by the bank to Beecher & Copeland were in excess of one tenth of its capital stock, etc., is answered by the rulings in *O'Hare v. Second N. Bank*, 77 Pa. 96; *Mapes v. Second N. Bank*, 80 Pa. 163; *Stephens v. Monongahela N. Bank*, 88 Pa. 157.

OPINION, MR. CHIEF JUSTICE PAXSON:

We think the offers of evidence in this case were properly rejected. Assuming all the facts covered by the offers to have been proved, they would not have amounted to a defence as against the bank. The whole confusion in the case grows out of the fact that the Mr. Beecher mentioned in the offer was at the same time a member of the firm of Beecher & Copeland, and cashier of the First National Bank of Warren, plaintiff below. The effort here is to make the bank responsible, not merely for matters done in the scope of his duties as cashier, or by authority of the bank, but also for his acts and declarations done or made in the pursuit of his private business. His interview with the defendant below at the post-office can only be taken as an effort on his part to procure accommodation paper to the amount of \$5,000, to take up a like amount of his firm's paper at the bank. In some way his firm had obtained a larger line of discount at the bank than is permitted by the general banking law; the bank examiner was expected soon, and it became necessary for defendant's firm to retire some of its paper. It was equally necessary, perhaps, for the bank; and the defendant, as its cashier, must have been fully aware of the importance of getting the accounts of his own firm in proper condition. He succeeded in procuring from the defendant his note for \$5,000, to replace a like amount of his firm's paper, with an assurance that the defendant should never be called upon to pay it. Had he given such assurance in writing it would not have made any difference, as the note was evidently for the

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accommodation of his firm, and it was as much the duty of the latter to protect it as if a stipulation had been made to that effect in writing. This is all that the offer of evidence amounts to. There is not a word to implicate the bank in any matter, except that it had allowed defendant's firm to exceed its lawful line of discount. There was no offer to show that the bank did anything, either by its board of directors or its officers, acting within the scope of their official duties, or by virtue of an express or implied authority from the bank. Nor was there any error in rejecting the offer to show that the bank had discounted paper for Beecher & Copeland for an amount of more than one tenth part of its capital. This was no concern of the defendant. That it was no defence to the note is shown by *O'Hare v. Second National Bank of Titusville*, 77 Pa. 96, and *Mapes v. the same bank*, 80 Pa. 163. There is nothing to show, nor was there any offer to prove, that the plaintiff bank knowingly and wilfully made this loan in excess of the legal limit. Such a matter may often occur by mistake; and when it does, it is perfectly proper to correct it. We see no error in affirming the plaintiff's point. The allegation of usury was not sustained by the evidence, and as there was no defence to the note it was not error in the learned judge to direct a verdict for the plaintiff. The view we take of the case renders a discussion of the authorities cited unnecessary. They have no application.

Judgment affirmed.

P. R. LENIG, ADMR., v. D. EISENHART.

ERROR TO THE COURT OF COMMON PLEAS OF SNYDER
COUNTY.

[Argued May 13, 1889—Decided May 27, 1889.]

In an action by the administrator of a person whose life was insured, against one to whom the assured had assigned the policy two days after it was issued, and who had received payment thereof after the death of

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the assured, the burden is upon the plaintiff to prove, not only that the assignee was not a relative of the assured but also that he was not his creditor.

Before PAXSON, C. J., STERRETT, GREEN, CLARK and McCOLLUM, JJ.

No. 179 July Term 1887, Sup. Ct.; court below, No. 21 December Term 1885, C. P.

To the term and number in the court below referred to, Philip R. Lenig, administrator of Jacob H. Lenig, deceased, brought assumpsit against Daniel Eisenhart, to recover the amount of a policy of insurance upon the life of said deceased received by the defendant. The defendant pleaded non-assumpsit.

At the trial, the plaintiff showed that on August 7, 1870, the Home Mutual Life Association of Pennsylvania had issued a policy of insurance on the life of Jacob H. Lenig for \$1,000; that two days afterward the assured in consideration of \$1 assigned the policy to Daniel Eisenhart, to whom the company paid the insurance after the death of the assured on September 5, 1880. The plaintiff then called one Samuel Spitler, stating that by said witness he proposed to prove that some time after the death of Jacob H. Lenig, in a conversation witness had with the defendant, the latter admitted to him that he was to pay Jacob H. Lenig \$5 for the policy; this for the purpose of showing that the insurance was speculative, and that the defendant was not a creditor of the insured. Under objection and exception to the defendant, the witness testified as follows:

"I went to Mr. Eisenhart and told him I was to get \$5 from him that he owed Jacob H. Lenig for insurance taken out on his life for \$1,000, and Mr. Eisenhart said that was their bargain, and he reached in his pocket and handed me \$3, and said this is all he would give me; it was all it was worth."

The plaintiff then rested, when the defendant moved for judgment of compulsory nonsuit, which was granted, the court, BUCHER, P. J., saying:

The plaintiff alleges that the policy, on which the defendant received the money in dispute, was a wagering one. The law

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hates such contracts. In order to make such contracts, it requires the assent of the plaintiff's intestate, as well as the defendant. The ordinary rule of law as to such contracts is, that the plaintiff cannot recover unless he can come into court with clean hands, that is, prove he has a case without showing that he too has broken the law. If he cannot do this, the law says that he is in *pari delicto* and there can be no recovery. The Supreme Court has made an exception to this well-known rule in these wagering life insurance policies and we propose to follow the rule. In the case on hand the plaintiff alleges that the contract was a wagering one, and he must prove it. One may have an insurable interest in the life of another in two ways: first, he must be of the blood of the insured in such a degree as to give him an insurable interest; second, the relation of debtor and creditor must exist between them. The plaintiff recognized this principle when he called witnesses to negative relationship by blood between the defendant and the assured. Proof of either of these conditions will strip the contract of the character of being wagering. The proof of non-relationship put the plaintiff half-way on the road to a recovery; but he could not stop there. He must go further and prove that the relation of debtor and creditor did not exist between the deceased and insured. The presumption is that the assignment of the policy to the defendant was all right. The law presumes that all men do right and obey the laws; that all contracts made by them are not forbidden. He who alleges the contrary must prove it. The plaintiff has so alleged, but the faint glimmer of evidence offered is insufficient to show that the relation of debtor and creditor did not exist, and hence we order a peremptory nonsuit.

Judgment having been entered, with leave, etc., the plaintiff's motion that the judgment of nonsuit be vacated was subsequently refused, when the plaintiff took this writ specifying that the court erred in sustaining the motion of the defendant and entering judgment of compulsory nonsuit, and more specifically in ruling, first, that the burden of proof was upon the plaintiff to show want of insurable interest in the defendant; second, that the evidence given by plaintiff was insufficient to show that the defendant had no insurable interest in the life of the insured.

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Mr. F. S. Simpson and *Mr. Charles S. Wolfe* (with them *Mr. A. C. Simpson*), for the plaintiff in error.

Mr. S. P. Wolverton (with him *Mr. Thos. J. Smith*), for the defendant in error.

PER CURIAM: •

The learned counsel for the plaintiff in error have failed to satisfy us that the court below erred in entering a nonsuit. The plaintiff proved that Eisenhart was not a relation of Jacob H. Lenig, the assured, and if he had also proved that Eisenhart was not a creditor of Lenig, he would have had a stronger case. The plaintiff contended, however, that the burden was upon the defendant to prove that he was a creditor of Lenig. We do not think so. The policy of insurance had been formally assigned to Eisenhart, and the company had paid him the money. He was *prima facie* entitled to retain it. The transaction upon its face was regular and legitimate. What occasion had the defendant, with the money in his pocket, to prove anything, until his right to retain it had been impeached by evidence? It must be remembered that this was not a suit against the company to recover upon the policy, but a suit by the administrators of the assured to recover the money from one to whom the company had voluntarily paid it, thus recognizing his right to recover it.

Judgment affirmed.

APPEAL OF J. B. RICHARDS.

[SPEERS V. RICHARDS.]

FROM THE DECREE OF THE COURT OF COMMON PLEAS OF
FAYETTE COUNTY.

Argued May 13, 1889—Decided May 27, 1889.

- (a) Pending a scire facias to revive a judgment, at issue under the plea of nul tiel record, the defendant, alleging insufficiency of the power under which the judgment had been confessed, and also payment, presented a petition for a rule to strike off the judgment and to open the same to let in a defence.
1. The judgment having been entered thirteen years before the scire facias issued, and sixteen years before the petition was presented, and no reason assigned for the delay, it was not error to discharge the rule granted and to permit the defence of payment to be made upon the trial of the scire facias.

Before PAXSON, C. J., STERRETT, GREEN, CLARK and McCOLLUM, JJ.

No. 115 July Term 1888 and No. 11 July Term 1889, Sup. Ct.; court below, No. 164 September Term 1872, C. P.

On February 20, 1888, J. B. Richards presented his petition setting forth that the note upon which the judgment, entered to the number and term of the court below referred to, in favor of Charles C. Speers against J. F. Richards and J. B. Richards, for the sum of \$1,500, "did not authorize any such act as a confession of judgment, and that said judgment was illegally confessed and entered, and is and was, therefore, void and of none effect; that the payment of said indebtedness was acknowledged to the deponent by Charles C. Speers in his lifetime, as deponent is ready and willing to prove by competent witnesses;" praying for a rule "to show cause why the entry of said judgment should not be stricken off and said judgment opened and he be let into a defence," etc.

To the rule granted, an answer was filed denying that the indebtedness was paid and averring that said judgment had been duly entered on August 20, 1872; that on July 24, 1885.

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a scire facias to revive said judgment was issued to No. 204 September Term 1885, to which the defendants had pleaded nul tiel record, and that said proceeding was still pending undetermined.

The note upon which said judgment was entered was as follows:

\$1,500.00.

"We promise to pay to Charles C. Speers fifteen Hundred Dollars for value Receiv'd and we hereby authorize the Prothonotary of Fayette County Penna to enter this on record hereby releasing all errors. Witness our hand and seals with interest at the rate of six per cents this Twentieth Day of March, A. D. 1872.

J. F. Richards. [L. S.]"

J. B. Richards. [L. S.]"

Charles C. Speers had died, and E. L. Speers, his executrix, was substituted to the record of the judgment. J. F. Richards had also died, and J. B. Richards, his administrator, was substituted.

The proceeding was heard on petition and answer, and on March 15, 1888, the court, EWING, J., without opinion filed, discharged the rule granted.

Thereupon the petitioner took an appeal, to No. 115 July Term 1888, and subsequently a writ of error to No. 11 July Term 1889, assigning for error in each the order of March 15, 1888, discharging the rule to show cause, etc.

Mr. Edward Campbell (with him *Mr. Howell* and *Mr. Reppert*), for the appellant.

Counsel cited: Section 28, act of February 24, 1806, 4 Sm. L. 278; *Rabe v. Heslip*, 4 Pa. 139; *Moore v. Hutchinson*, 1 Phila. 377.

Mr. R. P. Kennedy (with him *Mr. Homer H. Swaney*), for the appellee.

Counsel cited: *Helvete v. Rapp*, 7 S. & R. 306; *Lamb's App.*, 89 Pa. 407; *First N. Bank's App.*, 106 Pa. 68; *McCalmont v. Peters*, 13 S. & R. 196; *Cook v. Gilbert*, 8 S. & R. 567.

PER CURIAM:

This was an appeal from the refusal of the court below to

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open a judgment. The petition filed upon which the rule was granted, contained a prayer that the entry of said judgment be stricken off and that it be opened and the defendant let into a defence. The court did not act upon the motion to strike off the judgment; the motion to open it was refused. Had it acted upon both, the refusal to open is the only one that could be heard upon this appeal. There is no merit in either application. The judgment had been of record for sixteen years before any application was made either to strike off or to open it, and no reason is assigned for the delay. Aside from this, the only defence which the defendant sets up, that of payment, can be heard upon the scire facias to revive, which is now pending.

The order is affirmed.

DAVID DIEHL v. W. A. PETERSON, ET AL.ERROR TO THE COURT OF COMMON PLEAS OF BEDFORD
COUNTY.

Argued May 13, 1889—Decided May 27, 1889.

In this cause, an action of trespass against the sheriff for selling personal property of the plaintiff, a married woman, on an execution against her husband, the trial court properly submitted the facts in evidence to the jury, under correct instructions that the burden was upon the plaintiff to establish affirmatively by clear and satisfactory evidence that the goods claimed to have been unlawfully sold by the defendant, had been bought for her and paid for with money which she had of her separate estate.

Before PAXSON, C. J., STERRETT, GREEN, CLARK and McCOLLUM, JJ.

No. 31 January Term 1889 Sup. Ct.; court below, No. 53 April Term 1887, C. P.

On February 21, 1887, William A. Peterson and Mary J. Peterson, his wife, in right of said wife, brought trespass de

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bonis asportatis against David Diehl, sheriff of Bedford county, to recover damages for the sale of goods by the defendant as the goods of the husband, but which were claimed by the wife as her separate estate. The defendant pleaded: (1) Not guilty; (2) That the goods were not the property of the plaintiff; (3) That the defendant took said goods under legal process as sheriff of the county. Replication was filed, and issue joined.

On the trial the following facts appeared:

Jeremiah Clark, a judgment creditor of W. A. Peterson issued a fieri facias and levied on "2 acres of oats in the straw, 18 acres of corn in the ground, 12 bushels of wheat, 10 bushels of rye, and one half acre of potatoes and all defendant's other personal property." On November 11, 1886, Mrs. Peterson gave notice to the sheriff in writing as follows:

DAVID DIEHL, Sheriff of Bedford county:

Sir: The levy you took on the property of W. A. Peterson and advertised to be sold on the 15th as his property, is not his; it is mine and I would ask you not to sell the same, as the property is mine. Respectfully,

MARY PETERSON.

The sheriff did not sell this property, and subsequently Clark issued an alias fieri facias, whereon a levy was made upon certain other property as the property of Wm. A. Peterson. On January 11, 1887, the day of the sale on this last writ, Mary J. Peterson gave the sheriff another notice in writing, verified by affidavit made January 6, 1887, claiming, as her own property, "two horses, two cows, two sleds, two wagons, two sets of harness, one set of single harness, all the hay, corn-fodder, straw, and all the grain that was on the place, also a lot of shoats and other personal property belonging to my husband at the marshal's sale," and that the property specified had been bought in for her at a marshal's sale with money given her by her father and mother.

The execution plaintiff gave a bond of indemnity to the sheriff who proceeded and sold: One brindle heifer, one small heifer, two small bulls, one white cow, five shoats, one sow and pigs, two sheep, one lot of hay, one lot of screenings, one lot of corn, and one fanning mill.

The deputy sheriff who sold the goods, testified that Mr. Peterson notified him before the sale that the property was

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claimed by his wife. The plaintiff introduced other testimony to sustain the claim under the notice of January 11, 1887, and then made the following offers:

Mr. Longenecker: I now offer this notice attached to the writ, dated November 11, 1886.

Mr. Hall: I object to the notice because it means nothing if detached from the writ; the notice is incompetent in itself.

By the court: We have to admit that, and let the notice speak for itself; exception.¹

Mr. Longenecker: Now I will offer the original writ, No. 140 September Term 1886.

Mr. Hall: To that I object, that this notice with a former writ would have nothing to do with this particular notice and sale; moreover, the notice is general and does not specify any property in particular; and the writ discloses the fact that the levy was "2 acres of oats in the straw, 18 acres of corn in the ground, more or less, 12 of wheat, 10 bushels of rye, one half acre of potatoes in the ground, more or less, and all defendant's other personal property;" the phrase "and all defendant's other personal property" means nothing and is mere surplusage, and, being in a former writ, could by no means have any other construction.

By the court: We will admit that, as it is in line with previous matters; exception.²

The defendant in his case in chief made the following offers: Jeremiah Clark, called for defendant:

Q. When you had issued your second writ, state whether you got any notice? A. When I went to Pleasantville the sheriff was there, the day of the sale. I saw him, and he asked me to go down to Crissman's. I went, and he showed me the writ, and I looked over it, and he said—

Mr. Longenecker: I object to this.

Mr. Hall: I propose to prove that he looked over the notice and said, "We will not sell any property named therein, except those four shoats; for I am satisfied that they are not of the marshal's sale;" that he proceeded to sell, and that no other notice was given there by the woman or anybody else; and that he sold what he did sell by reason of this notice; and that there was no notice of any of these cattle or sheep or wind-mill being the property of Mrs. Peterson.

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Mr. Longenecker: I object to this offer for the reason that the notice must speak for itself.

By the court: That we will admit, but not what he said.

Mr. Hall: I want to prove what he said.

By the court: That we will not admit; exception.³

Q. Now did you sell anything, except the four shoats, that you were notified not to sell? A. No, sir.

Q. Did you get any notice of any kind from Mrs. Peterson except that written notice there? A. I did not.

Mr. Hall: Now I propose to show that he would not have directed the sheriff to sell anything there belonging to her if he had received notice. My reason is, because, on the other side, they have undertaken to show that we gave the sheriff a writing of indemnity when we gave the sheriff the writ; for Mrs. Peterson is estopped of any claim to the property which by her silence she permitted us that day to sell, and not only by her silence, but by giving us a written notice what not to sell.

By the court: This offer is refused. Exception.⁴

The court, BAER, P. J., charged the jury as follows:

This cause, being an action of a married woman to recover damages for the sale by the sheriff of personal property on an execution against her husband, which she claims as her own separate estate, she must therefore make good her claim to the property sued for by clear and satisfactory evidence or she cannot recover.

The rule is that when a married woman sets up a claim for property against her husband's creditors she must satisfy a jury of her claim by clear and satisfactory evidence. She must prove affirmatively that the goods were bought for her and paid for by her own money, of her separate estate. If the husband is found by you to have been largely indebted at the time the plaintiff alleges he paid her money, then such payment did not make it money of her separate estate unless he honestly owed her at the time and paid it to her as paying a debt.

If there is no proof by clear and satisfactory evidence that the property bought at the marshal's sale was paid for by her own money of her separate estate, the law will presume it was

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paid by the money of the husband. The same rule applies to any other property involved in the case. She must by the same clear and satisfactory evidence satisfy you of the gift of property and money from her parents, and that some of the cattle and sheep claimed are some of that property or the progeny of it.

The plaintiff's claim rests mainly on the testimony of husband and wife; they are competent witnesses, but their testimony is open to the closest scrutiny if unsupported. If she can establish a right by such evidence for all the property she claims, she would be entitled to a verdict for damages for the actual value. If she has only established such right or claim to a part, she would be entitled to a verdict only for the value of such part. You will have the sale list with you to guide you, if she is entitled to receive at all. If she has failed to satisfy you by clear and satisfactory evidence that any part of the property was of her own separate estate, then the verdict must be for the defendant.

The court is requested by the defendant to charge:

1. That the burden of proof is on the plaintiff to show property by clear and satisfactory evidence, and in the whole of the evidence in this case there is not such clear and satisfactory proof of title to the property as will warrant a verdict in her favor.

Answer: We affirm all of this point, except the request to say that it will not warrant a verdict for the plaintiff. We say that unless she satisfies the jury by clear and satisfactory evidence, she cannot recover; and as the evidence is mainly that of the husband and wife you must scrutinize it, as the contest is between the wife and her husband's creditors.⁵

2. That the evidence of the plaintiff having money of her own and paying for the property with it at the marshal's sale, is not such clear and satisfactory evidence as will warrant a verdict for her.

Answer: We affirm all of this point except the request to give binding instructions, and say that unless she satisfies you by clear and satisfactory evidence that the property at the marshal's sale was bought for her, and paid for with her money, which she had of her own separate estate, she cannot recover damages for any of that property embraced in this suit.⁶

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6. That the plaintiff is estopped by her silence in not giving notice at the sheriff's sale of her claim to the property now in dispute, viz.: the cattle, sheep and wind-mill.

7. That the plaintiff is estopped by her actual written notice of claim, dated January 6, 1887, and handed to the sheriff the day of the sheriff's sale, in which she did not claim any of the property now in dispute, to wit: the cattle, sheep and wind-mill.

Answer: If the jury find she was present at the sheriff's sale and gave no notice of any claim of hers to the property being sold, she is now estopped. Or, if she gave a written notice enumerating the property she claimed, and if that notice did not clearly point out and assert her claim to the property now claimed, then she is estopped and cannot recover in this case, unless she also gave a verbal notice of the property she now claims. The written notice you will take with you as you retire.⁸

The jury returned a verdict for the plaintiff for \$79.35 and judgment was entered thereon, whereupon the defendant took this writ, assigning for error:

- 1-2. The admission of plaintiff's offers.^{1 2}
- 3-4. The refusal of defendant's offers.^{3 4}
- 5-8. The answers to defendant's points.^{5 to 8}

Mr. William Maclay Hall, Jr., and Mr. William M. Hall, for the plaintiff in error.

Mr. Jacob H. Longenecker (with him *Mr. S. L. Russell*), for the defendant in error.

PER CURIAM:

This case does not require discussion.

Judgment affirmed.

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JOSEPH BEATTY v. W. F. HAMILTON ET AL.

ERROR TO THE COURT OF COMMON PLEAS OF FAYETTE
COUNTY.

Argued May 13, 1889—Decided May 27, 1889.

1. When a judgment in ejectment has been entered in favor of the plaintiff, to be released on payment of a sum certain on or before a specified day, time is of the essence of the contract, and if the money be not paid on or before the day, the judgment becomes absolute and indefeasible.
2. Counsel for the plaintiff has no power, in such case, to extend the time of payment, without express authority to do so from the plaintiff; nor has the court authority to interfere, after the judgment has become absolute by the defendant's neglect to pay within the specified time.

Before PAXSON, C. J., STERRETT, GREEN, CLARK and McCOLLUM, JJ.

No. 50 January Term 1889, and No. 3 July Term 1889, Sup. Ct.; court below, No. 76 March Term 1885, C. P.

On December 1, 1869, Dr. William F. Hamilton and L. Louisa Hamilton, his wife, by written articles of agreement, sold a house and lot, belonging to Mrs. Hamilton, to Joseph Beatty, for \$2,100, payable \$100 down and \$666.66 the first day of April of each year thereafter until paid. Beatty took possession and paid part of the purchase money, but failed to pay subsequent instalments as they became due. On December 26, 1884, Hamilton and wife, in the right of the wife, brought an action of ejectment against Beatty to enforce the payment of the balance of the purchase money. After issue joined, the case was called on May 21, 1888, and by agreement of counsel a conditional verdict was entered in favor of the plaintiffs for the premises in dispute, to be released on the payment by the defendant of \$2,826.77, in 90 days thereafter, the plaintiffs to file a warranty deed, etc.

On August 7, 1888, the plaintiffs filed a deed, in accordance with the verdict, and on September 6, 1888, had judgment entered on the verdict.

On September 18, 1885, the plaintiffs applied to the court

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for a writ of habere facias, which was ordered and duly issued. The defendant then filed a petition, upon which a rule was granted to show cause why the writ of habere facias should not be stayed, and why the plaintiffs should not be compelled to accept the amount of the verdict, with interest and costs, or why the verdict should not be amended by a clause providing that on failure by the defendant to pay the said sum within 90 days, the premises should be sold and proceeds paid to the plaintiffs and defendant, as to right and justice should belong.

Depositions taken by the parties were filed, and after argument, the court, INGRAM, P. J., on September 26, 1888, filed the following opinion :

This action of ejectment was brought to enforce the payment of purchase money, and when the case was tried on May 21, 1888, a verdict was rendered by agreement of parties as follows : " We find for the plaintiffs for the premises described in the writ, to be released on the payment by the defendant to the plaintiffs of the sum of \$2,826.77 in 90 days from this date ; the plaintiffs to file in the prothonotary's office a general warranty deed, conveying said premises to the defendant clear of all incumbrances."

The plaintiffs' deed to the defendant, which seems to be satisfactory, as no objection has been made to it, was filed in the prothonotary's office on August 7, 1888, within the time fixed by the verdict ; but the defendant has failed to comply with the terms of the verdict by paying the amount thereof within the time required ; and we are now asked, although the 90 days have passed, to require the plaintiffs to accept the amount of the verdict, interest and costs.

Have we the power to do this ? It has been repeatedly ruled that when a judgment in ejectment is entered by agreement of the parties, to be released on the payment of a certain sum on or before a certain day, " time is of the essence of the contract," and if the money is not paid on or before the day, the judgment becomes absolute and indefeasible : *Gable v. Hain*, 1 P. & W. 264 ; *Chew v. Phillippi*, 32 Pa. 205.

But the defendant claims that the counsel for the plaintiffs agreed to extend the time for the payment of the money beyond

Arguments.

that fixed by the verdict, and that he was misled by this agreement. This, the counsel for the plaintiffs denies, and says he never agreed to extend the time, but that he did agree that he would not proceed further in the matter until directed by the plaintiffs. If the counsel for plaintiffs had so agreed, without authority from the plaintiffs, and it is not claimed that he had such authority, would the defendant be in any better situation? We think not. It cannot be doubted that the plaintiffs may extend the time, but can his counsel without express authority from him do so? We have not been able to find any case that goes so far as to say that he can; but on the other hand, it is held in *Gable v. Hain*, *supra*, "if the plaintiff had accepted the money after the stipulated time, it would have amounted to a waiver; not so with respect to its receipt by the attorney, whose power only extended to issuing a *habere facias* to obtain the fruits of the judgment."

After a judgment has become absolute and indefeasible by the neglect or refusal of defendant to pay the amount within the time required by the verdict, the court has no power to interfere in the matter, whatever they might have been able to do had application been made before the time fixed for payment had passed. Under the evidence submitted in this case, we are of the opinion that the defendant is not entitled to the relief asked for.

A final order having been entered discharging the rule and dismissing the petition, the defendant took a writ of error to No. 50 January Term 1889, and an appeal to No. 3 July Term 1889, assigning in each the order discharging the rule, etc., as error.

Mr. Edward Campbell, for the plaintiff in error.

Counsel cited: *Webster v. Webster*, 53 Pa. 161; *Creigh v. Shatto*, 9 W. & S. 82; *Hewitt v. Huling*, 11 Pa. 27; *Brawdy v. Brawdy*, 7 Pa. 157; *Dixon v. Oliver*, 5 W. 509; *Connolly v. Miller*, 95 Pa. 513; *Walker v. France*, 112 Pa. 203.

Mr. S. E. Ewing, for the defendants in error.

Counsel cited: *Pott's App.*, 5 Pa. 502; *Chew v. Phillippi*, 32 Pa. 205; *Campbell's App.*, 29 Pa. 401; *Rowland v. Slate*, 58 Pa. 196; *Huston v. Mitchell*, 14 S. & R. 307.

Decision of Court below.

PER CURIAM:

This case is affirmed upon the opinion of the learned judge of the court below.

Decree affirmed.

BOROUGH OF RAINSBURG v. A. E. FYAN.

ERROR TO THE COURT OF COMMON PLEAS OF BEDFORD COUNTY.

Argued May 13, 1889—Decided May 27, 1889.

1. When bonds are issued by a borough to provide for the payment of an existing indebtedness recognized by the corporate authorities as a legal obligation, but the provisions of § 10, article IX. of the constitution, and of § 2, act of April 20, 1874, P. L. 65, are not complied with, the bonds are issued without authority and are void.
2. If, however, the debt is a lawful one, and the money borrowed is applied to an existing valid indebtedness, thus merely exchanging one creditor for another, the borough is liable for the money and recovery may be had against it on a count upon the simple contract for money loaned.

Before PAXSON, C. J., STERRETT, GREEN, CLARK and McCOLLUM, JJ.

No. 89 January Term 1889, Sup. Ct.; court below, No. 140 September Term 1887, C. P.

On May 23, 1887, the defendant entered an appeal from the judgment of a justice of the peace in an action by Albert E. Fyan against the borough of Rainsburg, to recover interest upon borough bonds held by the plaintiff, dated February 27, 1886. Issue.

The cause was tried on January 4, 1888, before BAER, P. J., without a jury, under the provisions of the act of April 22, 1874, P. L. 109, and on July 17, 1888, the following decision was filed:

From the evidence heard and admissions in argument made, I find the following facts:

127 74

186 484

127 74

180 191

127 74
215 460127 74
1222 318

Decision of Court below.

1. The municipality, by its officers in special meeting assembled, when all but one member of the council were present, recognized the costs and fees in certain suits as a legal debt against the borough, and appointed, by resolution appearing on the minutes, a committee of two of their number to ascertain the amount thereof and borrow money to pay the same, which proceedings, at the next regular meeting, having been read, the minutes were approved.

It does not appear that the borough was otherwise indebted at that time, to wit, December 12, 1885, nor does the precise amount of the indebtedness appear; though on argument both plaintiff and defendant assumed, and so argued, that the sum borrowed, to wit, \$500, was less than two per cent upon the assessed valuation next preceding the making of the loan, and that the sum borrowed was not all required to pay off the debt, but that \$150, or about that sum, now remains in the treasury of the municipality, the remainder having been applied to existing debts.

2. In borrowing the \$500 from the plaintiff, for which the said bonds in suit were given, the debt of the borough was increased as much as about \$150; but this sum, in excess of any then existing debt, remains in the treasury unused, ready to be repaid to the plaintiff.

3. The debt so incurred was not a debt incurred for the making of future improvements, or to pay for improvements made, but to pay an existing debt which accrued after the date of the constitution and the act of 1874.

4. The bonds are both under the corporate seal of the borough, and each calls for \$250, with interest from their dates, February 27, 1886, one payable in three, the other in five years; and each calls for payment of the state tax.

5. The form of the bond is the same in both, except as to number and time. No. 1 is as follows:

No. 1. \$250.

The borough of Rainsburg acknowledges to owe and stand indebted to Albert E. Fyan, his heirs and assigns, in the sum of two hundred and fifty dollars, payable three years after date, with interest from date, payable annually, and taxes on this loan.

Given under my hand and seal this 27 February, 1886.

B. F. GUMP, Secretary.

[SEAL.]

J. W. LEE,
Chief Burgess.

Decision of Court below.

6. The statement required by the act of April 20, 1874, P. L. 65, was not made nor filed in the office of the clerk of the Quarter Sessions.

7. The municipality did not, at or before issuing the said bonds in suit, provide for the collection of an annual tax sufficient to pay the interest and also the principal thereof within thirty years, as required by article IX., § 10, of the constitution of the commonwealth, and by § 2, act of April 20, 1874.

8. The plaintiff claims to recover \$31.50, the annual interest due on February 27, 1887, and the state tax on the loan, and by his statement filed claims, first, on a count drawn on the bonds; second, on a common count alleging a loan of \$500 for a term of years, the interest of which and state tax defendant promised to pay annually.

On the trial the defendant objected to the admission of the bonds in evidence.

1. Because the money was borrowed for an illegal purpose, for a purpose for which they could not bind the borough, and that they are personally and individually liable.

2. Because there are two conditions precedent prescribed by act of April 20, 1874, which must be performed before the bonds can issue; one, that they shall prepare a statement showing the indebtedness of the district at last preceding valuation and the amount of debt to be incurred, to be verified by oath and filed with the clerk of the Court of Quarter Sessions before any bond shall be delivered; the other, that they shall proceed and levy an annual tax to pay such indebtedness before they shall make any loan or issue any bonds; and neither were performed in the attempt to make this loan.

The objection was overruled, and evidence admitted, and bill sealed to the defendant.

The plaintiff objected to the admission of defendant's offer, which was as follows:

Offer to prove in what suit the costs were to be paid; that the burgess and three councilmen commenced a prosecution as individuals and incurred a large amount of costs, without any authority from the borough; and, in order to shield themselves from payment of the costs, they undertook to borrow this money and saddle the debt on the borough.

It was objected to by plaintiff: 1. As irrelevant. 2. No

Decision of Court below.

evidence that plaintiff had any knowledge of what use was to be made of the money. 3. And if used for an illegal purpose, plaintiff is not connected with it.

Objections sustained on ground of irrelevancy, and bill sealed to defendant.¹

The defendant offered auditor's settlement for previous year, made in the spring of 1886, to show that neither this loan nor the costs paid in same were included in that settlement.

Objected to, as immaterial and irrelevant and that it has been appealed from.

Objection sustained and bill sealed to the defendant.²

From the facts found on the evidence and from admissions made, I make the following conclusions of law:

1. The debt of the municipality, which was intended to be and was paid by the money borrowed from the plaintiff, was a lawfully contracted debt.

2. The municipality could issue bonds as evidences of indebtedness for such a debt, unless it falls within the constitutional prohibition and the act of April 20, 1874.

3. Section 8, article IX. of the constitution, provides that: "The debt of any county, city, borough, ... except as herein provided, shall never exceed seven per centum upon the assessed value of the taxable property therein, nor shall any such municipality or district incur any new debt, or increase its indebtedness, to an amount exceeding two per centum upon such assessed valuation of property, without the assent of the electors." Section 10. "Any county or other municipality incurring any indebtedness shall, at or before the time of so doing, provide for the collection of an annual tax sufficient to pay the interest and also the principal thereof within thirty years." That these constitutional provisions are mandatory and not merely directory, and are to be viewed in the light of limitations upon the powers to be exercised by municipalities, seems to us clear. They are safeguards in the interest of the taxpayer that must be observed.

4. Section 1, act of April 20, 1874, P. L. 65, makes void the increase of indebtedness above seven per centum, except as provided by law, and also makes void any obligation issued therefor. Section 2 provides that a debt may be incurred or an existing debt may be increased to an amount not exceeding

Decision of Court below.

two per cent upon the assessed valuation of the taxable property. The second clause of § 2 provides, that "before issuing any obligation or security for such debt the principal officer of the municipality shall prepare a statement showing the actual indebtedness of the district, the amount of last preceding valuation, the amount of debt to be incurred, the form and date of maturity of the obligations to be issued therefor, the amount of annual tax levied and assessed to pay the indebtedness, under oath, and file it in the office of the clerk of the Court of Quarter Sessions, and upon failure to do so he shall be guilty of a misdemeanor."

5. The statement required by § 2, act of April 20, 1874, was not filed. If it had been, the holder of these bonds would be held to have knowledge of all that was contained in the statement, and if by it it had appeared that the borough had no authority to issue the bonds, or that the bonds were given for a debt incurred in excess of two per cent on the last preceding valuation, and no tax had been levied to provide for its payment within thirty years, he could not recover on the bonds.

As the statement was not filed, how is the holder of the bonds affected? Manifestly he will be deemed to have full knowledge of all that should have appeared in a statement that ought to have been filed. In this case, what must such a statement have been? This must be ascertained from the facts found. On all the facts appearing, the statement, had it been made and filed, must and would have shown:

1. That the existing indebtedness of the borough preceding the issuing of the bonds did not exceed \$500.

2. That it was an indebtedness recognized by the municipality on its minutes as a legal indebtedness.

3. That the debt incurred or to be incurred by the two bonds of \$250 each, did not exceed two per centum of the assessed value of the property of the borough, including any previous indebtedness, and that the purpose of the loan was to discharge and pay off existing liabilities of the borough incurred since the dates of the constitution and act of 1874.

4. That the form, date of maturity, and number of the obligations to be issued was that disclosed by the two bonds, amounting together to \$500.

If these facts, that could be ascertained on inquiry, are all

Decision of Court below.

that was required to appear in the statement, then the facts that would give validity to the bonds existed, whether they were put on record in the statement required or not, and the plaintiff should recover.

But one requisite is lacking. The act of 1874, § 2, provides *inter alia*, that the statement to be filed shall show "the amount of the annual tax levied and assessed to pay the said indebtedness." As no annual tax was levied before or at the time of incurring the indebtedness, and no provision was made for the collection of an annual tax sufficient to pay the interest, and also the principal thereof within thirty years, the plaintiff on inquiry made, and he was thrown upon inquiry, would necessarily learn that this was not done.

The constitution, article IX., § 10, provides that "any municipality incurring any indebtedness shall, at or before the time of so doing, provide for the collection of an annual tax sufficient to pay the interest, and also the principal thereof within thirty years."

The plaintiff in the absence of a statement on file alleging a different state of facts must be taken to have known that the tenth section of article IX. of the constitution, and the second section of the act of April 20, 1874, were not complied with in this regard. It follows, therefore, that the bonds were issued without authority, in contravention of the constitution and the law, and hence there can be no recovery on the bonds.

It is, however, not required that the statement, etc., be filed before incurring a lawful debt, but that it be filed before issuing bonds as security therefor. In this case the debt was a lawful debt, and less than two per cent. At least \$350 of the amount borrowed was applied in the mere exchange of one creditor for another by paying an existing lawful debt, without thereby increasing the debt, and the other portion of the loan, to wit, \$150 of the identical money borrowed from the plaintiff, remaining in the treasury of the borough for the use of the plaintiff. It should not in this case be held to have been such an increase of indebtedness as becomes unlawful, for, taking into consideration this unexpended fund lying in the treasury and held there for the purpose, as seems conceded, to pay back to plaintiff, the indebtedness of the borough was not increased thereby.

Opinion of the Court.

We are clearly of opinion, therefore, that though the bonds are void, [yet the debt which they were intended to secure was and is a lawful debt, recoverable by suit on the contract, and that therefore under all the evidence the plaintiff is entitled to recover, on the second count in his narr or statement, \$31.50, with interest from February 27, 1887, and one year's state tax.]³

And it is now accordingly ordered that the prothonotary, after thirty days' notice of the filing of this decision to the parties or their attorneys, do enter judgment in favor of the plaintiff for \$34, unless exceptions be filed to this ruling.

On October 23, 1888, exceptions previously filed by both the plaintiff and the defendant, were dismissed, and judgment having been entered in accordance with the opinion, the defendant took this writ, assigning for error:

1, 2. The rejection of the defendant's offers.^{1 2}

3. The finding of the court that the debt to pay which the money was borrowed, was a legal debt and obligatory upon the borough.³

4. The finding of the court, that the borough authorities had power to borrow money without complying with the provisions of § 10, article IX. of the constitution of the state.

5. The construction placed by the court on § 2, of the act of April 20, 1874, and the ruling that a loan could be lawfully contracted for without issuing obligations or bonds therefor, the loan in this case being made upon bonds issued when it was made.

Mr. John Cessna, for the plaintiff in error.

Mr. Alexander King, for the defendant in error.

PER CURIAM:

This judgment is affirmed upon the opinion of the learned judge of the court below.

Judgment affirmed.

Statement of Facts.

APPEAL OF F. C. BRECKENRIDGE ET AL.

APPEAL OF J. K. EWING ET AL.

APPEAL OF CHARLES P. FORD.

[ESTATE OF A. C. NUTT, DECEASED.]

FROM THE DECREE OF THE ORPHANS' COURT OF FAYETTE
COUNTY.

Argued May 14, 1889—Decided May 27, 1889.

[To be reported.]

1. Where the administrators of an insolvent estate collected a sum due their decedent on an account open at his death, but paid it directly upon the claim of a creditor of the estate, they are properly surcharged with the amount thereof on the adjudication of their accounts.
2. In such case, however, the accountants are entitled to be subrogated to the rights of the creditor, so paid, in the dividend awarded to the latter's claim against the estate, to an amount not exceeding the amount of the surcharge.
3. A claim to the amount of such surcharge, set up by one alleging himself to have been a partner with the decedent in the transaction out of which it arose, was properly disallowed in this case, the evidence being insufficient to establish the alleged partnership.

Before PAXSON, C. J., GREEN, CLARK, WILLIAMS and McCOLLUM, JJ.

No. 262 January Term 1889, and Nos. 42, 45 July Term 1889, Sup. Ct.; court below, No. 23 June Term 1885, O. C.

On June 3, 1885, F. C. Breckenridge, Stephen R. Nutt and James Wells, administrators of the estate of A. C. Nutt, deceased, presented their first and partial account, showing a balance due the estate of \$20,828.82. Exceptions having been filed, *Mr. A. H. Wycoff* was appointed auditor to hear and determine the same and to report distribution.

The auditor filed his report on February 15, 1886, from which it appeared that the estate of the decedent was insolvent, and that many claims aggregating a large amount were duly proved against it. Upon one of the exceptions filed to

Statement of Facts.

the account by a creditor, the auditor surcharged the accountants with \$9,314.90. This amount was a balance of an oil account with J. C. Fisher & Co., oil brokers, open at the time of the decedent's death, and such amount, upon facts which sufficiently appear in the opinion of this court, had been collected by the administrators and paid over by them to General S. M. Baily, then or late state treasurer. Mr. Baily, as state treasurer, was a creditor of the estate of A. C. Nutt, who had been his cashier, and in the distribution was entitled to a dividend of \$5,928.75. The accountants, therefore, claimed a credit against the surcharge referred to to the extent of said dividend. The surcharge, however, was claimed by Charles P. Ford, surviving administrator of W. H. Coldren, deceased, on the ground that Nutt and Coldren were partners in the oil transactions out of which the surcharge arose. The auditor found that there was no partnership, as alleged by Coldren's administrator, and allowed the credit claimed by the accountants, reporting accordingly.

Various exceptions filed to the auditor's report were dismissed by the court, INGRAM, P. J., and the auditor's report finally confirmed. Distribution being ordered, accordingly,

F. C. Breckenridge et al., accountants, took an appeal, No. 262, assigning as error the dismissal of their third exception, which was as follows:

3. The auditor erred in surcharging the accountants with \$9,314.90, the amount received from J. C. Fisher & Co.

J. K. Ewing et al., creditors, took an appeal, No. 42, assigning as error, *inter alia*, the dismissal of their fourth exception, which was as follows:

4. The auditor erred in allowing the administrators of A. C. Nutt, deceased, the sum of \$5,928.75.

Charles P. Ford, surviving administrator of W. H. Coldren, deceased, took an appeal, No. 45, assigning as error, *inter alia*, the dismissal of his first exception, which was as follows:

1. The auditor erred in not awarding the \$9,314.90, paid by Fisher Brothers to W. H. Coldren's administrator.

These appeals were argued together.

Mr. W. H. Playford, for F. C. Breckenridge et al., administrators.

Opinion of the Court.

Mr. S. L. Mestrezat (with him *Mr. A. D. Boyd* and *Mr. R. H. Lindsey*), for J. K. Ewing, et al., creditors.

Mr. Edward Campbell, for Charles P. Ford, administrator, etc.

OPINION, MR. CHIEF JUSTICE PAXSON :

These appeals are all from the same decree, were argued together, and may be disposed of in one opinion. They will be considered in the order in which they are stated.

1. BRECKENRIDGE'S APPEAL.

There is but a single assignment of error in this appeal. It is as follows: "The Auditor erred in surcharging the account with \$9,314.90, the amount received from J. C. Fisher & Co." In order to understand this assignment, it is necessary to state the facts briefly. Adam C. Nutt, the decedent, over whose estate the present controversy arises, died suddenly December 24, 1882. At the time of his death he was cashier of General Samuel M. Baily, the state treasurer. Immediately after his death it was discovered that his accounts were short in the office of the state treasurer, to the extent of \$42,500. For some time prior to his death he had been speculating in oil, that is to say, he was buying oil on margins. At the time of his death he had an oil account with J. C. Fisher & Co. of Pittsburgh. Owing to a decline in oil, his margins were exhausted, and there was a small balance against him on the books of Fisher & Co. Had the administrators closed the account then, there would have been a loss. The state treasurer, believing that the money of the state had gone into this transaction, and being himself personally responsible for the deficit of his cashier, advised and urged the administrators of Captain Nutt not to close the account, but to carry it until oil should advance, and promised to margin the account if necessary. The administrators did so. Mr. Baily was not called upon, and did not put up any additional margins; the price of oil advanced, and as the result, it was afterwards sold at a profit of \$9,314.90. This sum was received by the administrators upon the settlement of the account with Fisher & Co., and they receipted for it in their official capacity. Instead of holding it for distribu-

Opinion of the Court.

tion as an asset of Captain Nutt's estate, they paid it over to Mr. Baily. Upon the audit of their account in the Orphans' Court, they were surcharged with this sum, and it was to this surcharge that the assignment of error refers.

This statement of the facts renders an extended discussion of this branch of the case unnecessary. It is clear that Mr. Baily was not entitled to the money in question. While it may be true that the amount realized was saved by his advice and suggestion, the fact remains that the oil belonged to Captain Nutt's estate, and had there been a loss it would have fallen upon the estate. Mr. Baily might have secured the benefit of the advance in the oil, had he taken the contract with the Fishers upon himself by a transfer of the account. In such case he would have become the owner of the oil, and the estate of Mr. Nutt would have had no further responsibility in the matter. This he did not do. He merely offered to put up any additional margins required, if the administrators would continue to carry the oil. He had a strong motive to do this. He was a creditor of Mr. Nutt's estate to a large amount, and had every inducement to make the assets realize as much as possible. Had he taken an assignment of this oil from the administrators, and placed himself in Capt. Nutt's shoes, he would have been in a position to realize as owner all the benefit of a rise in the price of oil. As it was, he was only entitled to share in such benefit as a general creditor of the estate. There is no merit in this assignment.

2. EWING'S APPEAL.

The seventh assignment raises the only question which requires notice in this appeal. It is as follows: "The court erred in overruling and dismissing the third exception to the auditor's fourth report, which exception is as follows: 'The auditor erred in allowing the administrators of A. C. Nutt, deceased, the sum of \$5,928.75.'" This sum was a dividend upon the \$42,500 which Capt. Nutt owed the state, or rather state treasurer Baily, who had made the account good in the state treasury. The latter was therefore clearly a creditor of the estate in that sum. The administrators of Nutt having been surcharged with the \$9,314.90 which they had paid to Mr. Baily, were in equity entitled to retain the dividend on the

Opinion of the Court.

\$42,500. In other words, they were entitled to be subrogated to Mr. Baily's rights in this respect. Mr. Baily does not object to this, and could not well do so, and no one else has any right to object.

3. FORD'S APPEAL.

The first assignment alleges that the court below erred in not awarding the \$9,314.90 paid to accountants by Fisher Brothers, to W. H. Coldren's administrator. This assignment is based upon the allegation that in the matter of the oil account with Fisher Brothers, Captain Nutt and the said W. H. Coldren were copartners. Had such partnership existed, it is clear the amount of profit realized from the sales of oil would have been payable to Coldren as surviving partner, and after his death, to his administrators. Unfortunately for this claim, it was a claim merely, and was not sustained by evidence. There was no testimony in the case from which an auditor or a jury would have been justified in finding a partnership. The most that can be made of it is, that in one or two of his letters to Mr. Coldren, Mr. Nutt used the conventional "we" in referring to these oil transactions. The strongest illustration I can give is in his letter of July 27, 1882, where he says: "I think it is a good scheme to buy ten or twenty thousand at 58, and as it always goes against us at the start be prepared to average down until we get a full load. We must have the benefit of the oil boom when it comes. Now I want to go down to 50c again and we must follow it down if it starts for that figure," etc. These were merely instructions of a principal to his agent. His use of the pronoun "we" was probably in the editorial sense and does not mean anything. It is a common thing to write in this manner. Members of the bar often use it in writing to their clients, or about their clients' business, and would doubtless be surprised if such expressions could be used as evidence of a partnership. In the absence of any evidence that Coldren was personally interested in these transactions, or that he had contributed a dollar of money in the purchase of the oil, we must regard the case as entirely barren of any proof of a partnership.

The decree is affirmed in each case, and the appeal dismissed at the costs of the appellants.

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EDWARD CAMPBELL v. COUNTY OF FAYETTE.

ERROR TO THE COURT OF COMMON PLEAS OF FAYETTE
COUNTY.

Argued May 14, 1889—Decided May 27, 1889.

[To be reported.]

1. The submission of a cause, under the provisions of the act of May 14, 1874, P. L. 166, to a person learned in the law but not authorized to act as an attorney in the Supreme Court of this state, is erroneous, and all proceedings under it, with the award made, are invalid.
2. County commissioners, representing the people of a county, act in a fiduciary capacity, and are without authority to submit a case to the decision of the court under the act of April 22, 1874, P. L. 109; wherefore, they may not legally enter into a submission to a person learned in the law under the act of May 14, 1874, P. L. 166.
3. In the case at bar, the submission having been made by the county commissioners, as one of the parties, to a person learned in the law but unauthorized to act as an attorney in the Supreme Court, the entire proceeding was abortive, and the court where the cause was pending had ample power to set it aside.

Before PAXSON, C. J., GREEN, CLARK, WILLIAMS and McCOLLUM, JJ.

Nos. 197, 333 January Term 1889, Sup. Ct.; court below, No. 225 December Term 1887, C. P.

On November 7, 1887, Mr. Edward Campbell brought assumpsit against the county of Fayette, to recover a bill for professional services rendered. The defendant, pleaded non-assumpsit.

On December 3, 1887, the following submission was filed:

And now, December 3, 1887, the parties above named, by their respective attorneys, do hereby agree to submit the above cause to the decision of Wm. G. Guiler, Esq., under the act of assembly of May 14, 1874.

R. P. KENNEDY,

Plaintiff's Attorney.

A. D. BOYD,

Defendant's Attorney.

On January 16, 1888, the following paper was filed:

Opinion of Court below.

January 16, 1888, on motion to the court, by agreement of counsel for both parties, Robert F. Hopwood, Esq., is appointed referee in this case, instead of Wm. G. Guiler, Esq., who was appointed referee and since his appointment has become counsel in the case.

W. G. GUILER,

Defendant's Attorney.

R. P. KENNEDY,

Plaintiff's Attorney.

Notice of this appointment was served upon Mr. Hopwood on July 3, 1888, when he accepted and was duly sworn.

The referee filed his decision on August 23, 1888, awarding to the plaintiff the sum (as afterwards corrected) of \$2,202.06. Notice of filing the report was given to the attorneys of the parties, and on September 5th, on petition of the defendant, by the then county commissioners, a rule was granted on the plaintiff to show cause why the submission should not be set aside, the appointment of referee vacated, and all proceedings before said referee, and his report, be set aside. To this petition an answer was filed.

The matter was heard upon petition and answer, and on December 17, 1888, the court, EWING, J., filed the following opinion and decree :

On December 3, 1887, a written agreement, signed, not by the parties but by their attorneys, to submit this case to the decision of Wm. G. Guiler, Esq., under the provisions of the act of May 14, 1874, P. L. 166, was filed in the proper office, but before any further action was taken it became impossible, by reason of a change in the board of county commissioners, and the employment of Mr. Guiler as legal adviser of the county, for Mr. Guiler to act under said agreement, and on January 16, 1888, by agreement of the attorneys, Robt. F. Hopwood, Esq., was substituted as referee. Nothing more was done in the case until July 3d, when written notice of his selection as referee was served upon Mr. Hopwood, who at once accepted and took the prescribed oath before the prothonotary, both the acceptance and oath being written on the back of the notice aforesaid, but not filed in the prothonotary's office within twenty days, nor, indeed, at all, except as a part of the report filed August 23d, being attached thereto. The referee, by writing

Opinion of Court below.

on said notice, also, and not filed within the twenty days, appointed July 14th as the time, and his office as the place, of hearing, without any agreement between the parties and himself, so far as appears, to have the hearing elsewhere than the place designated in the act of assembly, viz.: the Court House. This notice was served upon the defendant's attorney.

On the day appointed for hearing, defendant's counsel appeared and objected to the referee proceeding in the case, alleging the agreement of submission to be void, because the county commissioners act in only a fiduciary capacity and have no authority, therefore, to make such an agreement. This objection the referee did not consider valid, and the hearing proceeded. At the conclusion of the plaintiff's evidence, apparently on the same day, July 14th, defendant's counsel requested a continuance until he could have an opportunity to apply to court to have the submission vacated, which application could not be made until September term, beginning the first Monday of September, the June term being closed about the middle of June. This request the referee declined to grant, on the ground that the court had no right or authority to set aside the agreement. Again, on August 16th, defendant's counsel objected to the referee proceeding in the case; protested against his action in overruling the objections already made and refusing the continuance requested; refused to offer any testimony, and presented as a further objection that the said referee could not act in the case because he was not "authorized to act as an attorney in the Supreme Court of this state." Mr. Hopwood, it is admitted, has never been admitted to practice as an attorney in the Supreme Court, but he overruled this objection on the ground, not denied, that he is "qualified for admission to the Supreme Court," and that "authorized," in the act, means "qualified" and not "admitted." Therefore, the referee proceeded to make out his report, and the same was filed. August 23d, 1888.

On September 5th the petition of the county commissioners was presented to the court, setting forth the main facts, and praying for a rule on the plaintiff to show cause why the agreement of reference, and the proceedings before the referee should not be set aside, because, first, the county commissioners could not make such an agreement, as they act but in a fidu-

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ciary capacity, and secondly, because Mr. Hopwood is not authorized to act as an attorney in the Supreme Court of the state, and therefore could not act as referee under the said act of May 14, 1874. In answer to the rule granted upon this petition, the plaintiff alleges that this court has no jurisdiction, and that the matters complained of are all embodied in exceptions to the report of the referee, and can only be legally passed upon and disposed of by the Supreme Court. The disposition of this rule is the matter now on hand.

The failure of the referee to file his acceptance and oath, and appointment of time and place of hearing, in the prothonotary's office within twenty days, and his appointment of other than the Court House, as the place of hearing, without any agreement of the parties to that effect appearing, are matters concerning which no question is here raised. Nor is any exception taken because of the failure of the parties to sign the agreement of submission; and, consequently, it may be taken for granted that the attorneys were authorized and directed by the parties to make such agreement for them. Were the question raised, however, I am inclined to think it would invalidate the submission, for the statute provides only that "the parties may, by written agreement," etc., and I don't see how the agreement can well appear to be that of the parties unless it is signed by them. When drawn like the one in this case, thus, "the parties above named, by their respective attorneys, do hereby agree," etc., and signed by the attorneys alone, it appears rather as the agreement of the attorneys, and the record shows no assent of the parties at all. At all events, it is bad practice, fruitful of controversy, and may occasion unpleasant and troublesome questions between attorney and client, and should be eschewed.

The first reason assigned why the agreement of reference should be set aside is, that the county commissioners, representing the defendant, act in a fiduciary capacity, and therefore, are not authorized by the act of May 14, 1874, to make such an agreement, since said act only confers that authority upon the parties who "may legally, by agreement in writing, submit a case to the decision of the court;" and the act of April 22, 1874, providing for the submission of cases to the decision of the court, expressly excepts parties "acting in a

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fiduciary capacity." *Chester Co. v. Barber*, 97 Pa. 464, is cited in support of the proposition that county commissioners act in a fiduciary capacity, and sustains the position for that case, at least, and it is not necessary to question it here. But may not parties "acting in a fiduciary capacity" "legally, by agreement in writing, submit a civil suit or case to the decision of the court?" Is that exception in the act of April 22, 1874, constitutional? Is it not an attempt by the legislature to limit the provisions of § 27, article V. of the constitution of 1874? That section declares that "the parties," without exception, be it noted, "by agreement filed, may in any civil case dispense with trial by jury," etc. A right or privilege thus conferred cannot be limited by legislative enactment. The legislature cannot say such and such persons shall enjoy it, and such and such shall not. If that provision in the constitution means what it plainly says, that the parties in any civil case may submit it to the decision of the court, etc., that embraces any and all parties, and the exception in the act of April 22, 1874, is unconstitutional and void, and the right thus to submit a case to the decision of the court is without exception as to the character of the parties in any civil suit. That such is the case seems to be clear. It therefore follows, that the right, in like manner, to submit the decision of a civil case to a referee, under the act of May 14, 1874, is without limitation as to the character of the parties also, and that such a submission is valid in this case.

But, it may be said, that section of the constitution does not execute itself: *Commonwealth v. Mitchell*, 80 Pa. 58, and the legislature only having provided for carrying it into execution so far as concerns parties not acting in a fiduciary capacity, the right is not complete in such trustees. Yet, would that construction and effect be given to the act of April 22, 1874, because of the ineffectual attempt therein to limit the right, when the evident purpose of the act was to declare the manner in which the constitutional privilege should be exercised? Would it not rather be held that the annulment of the limitation left the act as if such exception had never been expressed, and, consequently, as broad and comprehensive in its bearing as the provision of the constitution which occasioned it? And beyond this, the constitution vests the right, the legislative enactment

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only regulates the practice under it: *Commonwealth v. Mitchell*, supra. Had the conclusion been that the defendant had no right or authority to make such agreement of submission, the power of the court to set aside the agreement could hardly be doubted; for then the agreement would have been invalid, no authority would have been vested thereby in the referee, and the jurisdiction of the court would not have been ousted.

The second reason why the agreement should be set aside is that the referee does not possess the statutory qualification to act, not being "authorized to act as an attorney in the Supreme Court of this state." As stated, the direct answer made to this by the plaintiff is that "authorized," in the act means qualified, and that the referee is so qualified. But authorized and qualified are by no means synonymous, and have entirely different meanings. One may be qualified to fill any position and to discharge any duties, and yet have no authority whatever to do so. And one may be qualified by having complied fully with the requirements of Rule VI. of the Supreme Court, as the referee states in this case, and yet be refused admission as an attorney of that court. And no one is "authorized to act as an attorney in the Supreme Court of this state" unless that court has conferred the authority. The admission of an attorney is a judicial act, and the judges of the Supreme Court have exclusive jurisdiction in respect thereto in that court. This authority is conferred by § 68 of the act of April 14, 1834, P. L. 354. Until the judges of the Supreme Court have passed upon the application of an attorney for admission to that court, and pronounced a favorable decision, and the applicant has taken the prescribed oath, he is not "authorized to act as an attorney" therein. It therefore follows that, no matter how well qualified or competent the referee in this case may be to act as an attorney in the Supreme Court, yet never having been admitted as an attorney of that court, he is not authorized to act as an attorney therein. And, if not so authorized, it is not questioned that he could not act as referee in a case submitted under the act of May 14, 1874. It is remarked, however, that there is no reason for embodying such a provision or requirement as the qualification of the referee in the act, but this observation overlooks the fact that the decision of such referee is reviewable directly and only by the Supreme Court, and that

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the legislature must have had in view, if no other reason, the fitness of things, in determining that the Supreme Court should not thus be called upon to review the decision of any one not an officer of that court. This provision establishes a direct connection, at least, between the two tribunals.

But, it is strenuously insisted that this court cannot interfere to set aside the submission, even if the referee be disqualified to act; that the court in which the suit is pending can only thus act for the three causes specified in the sixth section of the act. Admitting that, so far as a submission valid in the first place is concerned, yet cannot the lower court certainly declare null and void an invalid submission? If an effort to submit a cause under this act be made and the provision of the act is not complied with in the agreement, surely the court where the cause is pending can annul the agreement, for the authority conferred by the statute would not then have legally vested in the referee, and the jurisdiction of the court would not be ousted.

Here it may be said that the original agreement was valid, since Mr. Guiler was qualified to act as referee, and that thus the jurisdiction of the court was lost. So be it; but when Mr. Guiler, before notice of his appointment was served upon him or any action at all taken under the agreement, became defendant's counsel, then it "became impossible for him to act" as referee, and the jurisdiction of the court vested again by the very terms of the act itself. And the jurisdiction of the court having thus vested, so that the agreement could be set aside upon the application of a party in interest, after notice, it was not again ousted by the substitution by the parties, as referee, of a person not qualified to act, for, as has been said, the disqualification of the referee would prevent the authority conferred by the statute from vesting. This would be the case even if the disqualification of the referee, unknown before and discovered after his appointment, does not itself come within the spirit, if not the letter, of the second ground specified in the act for the court's interference, viz.: when "it becomes impossible for him, the referee, to act." True, it does not strictly here "become" impossible for him to act, since the disqualification existed before his appointment; but the fact of that disqualification "becomes known" subsequently, so as to possibly bring the case within the spirit at least of that provision.

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Again, it is said that this rule should be discharged, even if the court had the power to decree otherwise, because the very points here treated are embodied in exceptions filed to the report of the referee and can be passed upon by the Supreme Court. This view of the case would be adopted very willingly if it were not that, believing this court to have the power, under the circumstances of this case, to set aside this agreement, it then becomes the duty of the court, since application for that purpose has been made by one of the parties, to do so; and were it not also that, possibly the Supreme Court might think, since the submission of the case to the referee is defective and illegal, that their jurisdiction under the act does not extend so far as to correct that feature, but only to a review of the rulings and judgment of the referee, and that this court is the proper place to have any such remedy as demanded administered. Moreover, if the view of the case here taken is erroneous, by making this rule absolute an opportunity is thereby afforded to have the Supreme Court correct the error on review, and declare clearly the law upon the point here raised.

For the reasons here given the rule is made absolute.

And now, Dec. 17, 1888, this matter having been argued by counsel and fully considered, it is hereby ordered and directed that the rule to show cause, etc., be made absolute, the agreement of submission and all proceedings thereunder vacated and set aside, and the case restored to its place on the issue docket, the costs incurred by the reference to be taxed as part of the costs in the case and abide the event of the suit. Exception.

Thereupon the plaintiff took the writ of error to No. 197 and the appeal to No. 333, assigning as error in each the order of December 17, 1888, making the rule absolute, etc.

Mr. R. P. Kennedy, for the plaintiff in error.

Mr. W. G. Guiler, for the defendant in error.

OPINION, MR. CHIEF JUSTICE PAXSON:

The plaintiff brought this action in the court below to recover compensation for professional services to the county of

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Fayette. By agreement of counsel, in writing, the case was referred to a member of the bar, under the provisions of the act of May 14, 1874, P. L. 166. The referee made an award in favor of the plaintiff in the sum of \$2,202.66. Upon the petition of the county commissioners, the court below granted a rule on the plaintiff to show cause why the "agreement of reference should not be set aside, the appointment of the referee vacated, and all proceedings before said referee, and his report, be set aside." This rule was made absolute by the court, and this action is the matter complained of here.

The ruling of the learned judge can be sustained upon two grounds. The first section of the act of 1874, under which this reference was made, provides, "That in all civil suits or cases which the parties may legally, by agreement in writing, submit to the decision of the court in any county or city of this commonwealth, the parties may, in like manner, by written agreement, submit the case to the decision of any person learned in the law, who is authorized to act as an attorney in the Supreme Court in this state." It was admitted that the learned referee in this case had never been authorized to act as an attorney in this court, however well fitted he may be to do so. The act does not say that the referee must be qualified to act as an attorney in the Supreme Court, but that he must be "authorized" to so act. There is a wide distinction between these words. However well qualified an attorney may be for admission to the bar of this court, he can only be authorized to act as such by an order of admission, and this can only be done by the court. We are of opinion that the learned referee was not entitled to act under the act of assembly. It follows that the appointment was improvidently made, and his award had no validity.

There is, however, another ground which we think equally fatal. It will be noticed that the act of May 14, 1874, only confers the authority to refer upon such parties who "may legally, by agreement in writing, submit a case to the decision of the court." The county commissioners, representing the people of the county, and having the control of their funds, act in a fiduciary capacity: *Chester County v. Barber*, 97 Pa. 455. The act of April 22, 1874, P. L. 109, providing for the submission of cases to the decision of the court, expressly ex-

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cepts parties acting in a fiduciary capacity. We do not think this exception is to be confined to persons who are technical trustees under appointment by will or deed, or by the court. The words are to be used in their broad, popular meaning, as best calculated to carry out the object of the legislature. The language is comprehensive enough to include county commissioners, and all other public officials who have charge of the public money, as well as all private trustees clothed with authority over the property of others. We think the exception applies with especial force to county commissioners, and its object was evidently to prevent the money of the public being parted with in such cases as this, until the right thereto has been established by the verdict of a jury.

We do not attach much weight to the argument that the court below had no power over the award; that it could only be reviewed here. There would have been more force in this position, had there been a legal reference and a legal award. But the whole proceeding was abortive, and the court below had ample power to set it aside.

Judgment affirmed.

APPEAL OF FRANCIS A. MILLER, EXR.

[ESTATE OF PHILIP DEVORE, DECEASED.]

FROM THE DECREE OF THE ORPHANS' COURT OF BEDFORD
COUNTY.

Argued May 14, 1889—Decided May 27, 1889.

[To be reported.]

- (a) Albright and Miller, as executors, filed a joint account, and upon distribution \$3,000 of the balance was directed to be retained by the executors "and safely invested" for the payment of legacies to that amount payable as the six legatees entitled became of age. This balance was left in the hands of Albright.
- (b) Afterwards, a second account was filed, showing a separate liability of the accountants, and after confirmation thereof a joint judgment was entered against them on a transcript from the Orphans' Court, protective of persons interested in the balance shown by this account, who were subsequently paid in full.

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- (c) Albright becoming insolvent made an assignment; Miller paid the six legatees their legacies, though the fund had never reached his hands, and out of the assigned estate of Albright was awarded a dividend upon the joint judgment referred to, which was presented for his benefit under a claim as of subrogation.
- (d) Subsequently, upon the petition of residuary legatees, alleging that there was a balance of the estate undistributed, an auditor was appointed to find the facts and state an account; the auditor reported an account and decree charging Miller, in favor of the residuary estate, with the dividend received and with the interest on the \$3,000 fund, which report was confirmed.
1. It was error to charge Miller with the dividend received from the assigned estate of Albright; the money was not due to the estate of his decedent, nor awarded to it, but to Miller, and it was not to be treated as assets of said estate.
 2. The order directing the investment of the \$3,000, imposed no duty upon Miller for the benefit of the residuary estate, but was made for the benefit of the six legatees, then under age; and, as Miller had paid said legatees, he had substantially complied with the order, and it was error in this proceeding to charge him with the interest on the fund.

Before PAXSON, C. J., GREEN, CLARK, WILLIAMS and McCOLLUM, JJ.

No. 284 January Term 1889, Sup. Ct.; court below, number and term not given.

In March, 1879, Mrs. Rebecca Valentine et al., children and grandchildren of Philip Devore, late of Londonderry township, deceased, presented their petition representing that said Philip Devore died in 1868, having made his last will and testament, duly admitted to probate, of which will Josiah Miller and Jacob L. Albright were the executors; that said executors had filed two accounts, but that said accounts did not entirely settle and close the estate of said testator, and there were moneys in the hands of said executors, or should be, which ought to be distributed and paid to the legatees; praying for a citation, etc.

An answer was filed by Josiah Miller setting out that when the first account was filed he unfortunately joined with his co-executor therein; and that all the balance not paid out was then in the hands of said co-executor; that although the entire balance which was set apart for the payment of sundry legacies to persons, when and as they should reach the age of twenty-one years, was in the hands of his co-executor, the respondent had been compelled to raise money and pay them;

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and that since the filing of his last account, he had received no money or assets of the estate of the decedent.

The answer of J. L. Albright set out that after the filing of the two accounts, which had been duly confirmed and distribution fully made thereon, he was discharged from the trust, and the business of the estate was then solely in the hands of his co-executor, Josiah Miller; that all moneys of said estate had been fully accounted for in said two accounts, and that since that time the respondent had not received one dollar of the estate of the decedent.

On June 2, 1879, *Mr. M. A. Points* was appointed auditor, "to find and report the facts with an opinion on the law." On October 9th, 1879, on motion of the petitioners' attorneys, the powers and duties of the auditor were enlarged "so that he be required to state an account for the said respondents," and make report of the same.

The facts developed in the several hearings before the auditor, as shown by his several reports, so far as material to this case, were as follows:

The will of Philip Devore, dated January 1, 1868, was admitted to probate on February 6, 1868, and letters testamentary issued on the same day to Josiah Miller and J. L. Albright.

The decedent, in 1867, had sold certain real estate to J. L. Albright for \$3,000, taking notes at long periods, with the interest added to each instalment, so that the notes would not bear interest except from maturity. These notes went into the hands of J. L. Albright as assets of the estate.

By the will six legacies of \$500 each were given to grandchildren, then quite young, payable to them on reaching majority. There was evidence that the notes referred to were intended to meet these legacies.

On October 16, 1869, the executors filed a joint account, confirmed November 16, 1869, showing a balance in their hands of \$5,818.14. This account was referred to Mr. S. L. Russell, as auditor, for distribution. In his report the auditor ascertained the net balance, and directed: "From this sum of \$5,740, deduct the amount of the special legacies, \$3,000, which is to be retained by the executors and safely invested for the legatees, \$3,000." The report was confirmed February 14,

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1870, and distribution decreed accordingly. The residue, after making the deduction, was paid promptly to distributees.

On October 26, 1871, the executors filed separate supplemental accounts, which were confirmed November 11, 1871, and referred to the same auditor, Mr. S. L. Russell. The amounts in the hands of the respective executors were stated in the auditor's report separately, thus: "Miller, \$2,851.03; Albright, \$2,018.97;" showing total amount for distribution \$4,870.

Early in 1874, Mr. Albright became involved. On May 11, 1874, a certificate from the Orphans' Court was filed in the Common Pleas showing a balance in the hands of Josiah Miller and J. L. Albright, as executors of Philip Devore, deceased, of \$4,870; a scire facias was issued thereon, and judgment obtained soon afterward. There was evidence, however, that in fact the amount for which this judgment was obtained had all been paid to the parties in interest, except a balance of \$307.90, payable by Miller and paid by him in 1876.

On July 20, 1874, J. L. Albright made an assignment for the benefit of creditors. Upon petition afterwards presented, an order was made October 21, 1875, discharging him as one of the executors of Philip Devore deceased; and in 1877 his assigned estate was distributed by Mr. John H. Jordan, as auditor, before whom the joint judgment above referred to was presented on behalf of Josiah Miller, now the sole executor, and a dividend of \$192.61 awarded thereon and received by Miller.

When the final report of the auditor was made, the six legatees had been paid their legacies of \$500 each, and they had assigned them with the interest accrued thereon to the estate of Josiah Miller, who had died pending the proceedings.

Upon the contention made before him upon the foregoing facts, the auditor charged the estate of Miller with the dividend of \$192.61, hereinbefore referred to, and interest amounting to \$323.39, and also with \$1,714.49, interest on the six legacies, and interest thereon, amounting to \$2,140.88, and recommended a decree awarding said sums to the residuary legatees.

Exceptions filed by Francis A. Miller, executor of Josiah Miller, deceased, to the report of the auditor were dismissed by the court, BAER, P. J., the report confirmed, and a decree en-

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tered as recommended, when the exceptant took this appeal, specifying that the court erred:

1. In charging the estate of Josiah Miller with \$192.61, dividend and interest thereon received from assigned real estate of Jacob L. Albright, in all \$323.39.

2. In charging the estate of Josiah Miller with \$1,714.99, interest on the six special legacies, and \$425.89, interest thereon, in all \$2,140.88.

3. In appropriating the interest on the special legacies, \$2,140.88, if charged against the executors, to the general or residuary legatees of Philip Devore, deceased, and in refusing to appropriate the same to the estate of Josiah Miller, deceased, as all of said special legacies and all interest thereon had been assigned to Miller's estate.

Mr. John M. Reynolds and *Mr. John Cessna*, for the appellant.

Mr. J. H. Longenecker (with him *Mr. A. L. Russell* and *Mr. Thomas Armstrong*,) for the appellees.

OPINION, MR. JUSTICE WILLIAMS:

The first assignment of error must be sustained. The money to which it relates was not due to the estate of Philip Devore but to Miller, for money which he had paid for his co-executor. The certificate from the Orphans' Court on which the lien had been entered in the Common Pleas was for a balance shown in the hands of the executors by their second account, which balance, so far at least as Albright was concerned, had been fully paid. When Miller presented it to the auditor who was charged with the distribution of the proceeds of the assigned estate of Albright, and asked a pro rata allowance upon it, he treated himself as subrogated to the rights of the plaintiffs, who had been paid in full, and was himself the claimant. It may be that the auditor would have been justified in rejecting this claim altogether, but he did not. He awarded to Miller his proportionate part of the fund as a creditor of Albright. The money was not due to Devore's estate, nor awarded to it, but to Miller, and it is a mistake to treat it as assets of Devore in the hands of Miller.

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The question raised by the second assignment is more formidable. The first account of the executors of Devore was filed as a joint account, on October 16, 1869, and showed a balance in their hands of \$5,818.14. An auditor was appointed to make distribution of this sum who reported a recommendation that \$3,000 should be set apart to pay six specific legacies of \$500 each, and "safely invested for the legatees;" and that the balance should be distributed in accordance with a table submitted with the report. Final confirmation of this report was made on February 14, 1870, and distribution ordered in accordance therewith. The duty to see to the safe investment of the \$3,000 for the legatees, was by the decree of confirmation imposed upon both the executors. The decree was not literally obeyed, but the legatees have been fully paid by Miller. The residuary legatees are now seeking to charge Miller with the interest which the fund would have produced, if it had been invested at the date of the decree and kept constantly at interest until the first legatee came of age in August, 1874, and then upon the several balances left due after the successive payments had been made, to January, 1884, when the last legatee came of age. Upon the total of interest so accumulated they charge interest to the date of the decree in March, 1888. If Miller had been in possession of the fund, and had been able to keep it constantly at interest, it might have earned for the benefit of the residuary legatees, something like the amount thus claimed; but it is clear from the testimony, and we do not understand it to be denied, that the money thus set apart was mainly if not wholly in the hands of Albright, the co-executor, when the order was made, and so remained until he became insolvent, and was lost in great part by his failure.

We are then to inquire into the effect of the order of February 14, 1870, requiring the investment of \$3,000 for the payment of the six legatees. It was made for the protection of those legatees. In letter and in spirit it looked to a provision for the prompt payment of those objects of the testator's bounty, as they severally came of age. It was not intended to increase the residuary estate by the accumulation of interest through a long series of years, nor was such a purpose fairly within the power of the Orphans' Court. The proceeding was one for making distribution. The recommendation of the au

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ditor was, as we have seen, intended to secure the payment of the six legacies, and the decree of confirmation did not enlarge its scope. It became the duty of Miller, therefore, as well as of Albright, to see that these legacies were paid as they fell due, and the fact that he allowed the fund to remain in the hands of his co-executor and that it was lost by his failure, cannot relieve him from the obligation to pay. This obligation he recognized and has, at considerable loss to himself, discharged. He has made amends for his failure to invest the money with which to pay these legacies, by paying them out of his own pocket, and has thus discharged the duty imposed upon him by the order, not in accordance with its terms, but with fidelity to its object.

The legatees, who were the objects of solicitude to the auditor and the Orphans' Court, are not complaining and have no reason to complain. They are fully paid. This proceeding is by the residuary legatees, who seek to charge Miller with more than two thousand dollars of interest which it is conceded he never received, but which it is alleged it was his duty to accumulate for them under the order of February 14, 1870. But the residuary legatees were not the objects of that order. The specific purpose in view was security for the six legatees, and the court made distribution from time to time to the residuary legatees, recognizing their right to payment as fast as it could be made. They have no claim upon Miller by reason of the order to invest, because the investment was directed for a specific purpose in which they were not interested, and which has been fully met. His liability to them must depend upon his general liability as executor, and the fact that he joined in the first account with Albright; and, if it is true, as asserted in the paper book of the plaintiff in error, that every dollar of the assets which came to the hands of the executors, except the uncollected notes of Albright given to Devore in his lifetime, has been accounted for, his general liability has been fully discharged. But our question relates only to his liability for the interest upon an investment that was never made, though directed for a special purpose to which the residuary legatees were strangers. We hold that he is not liable by reason of the order of February 14, 1870, because that order imposed no duty on him relating to or for the benefit of the

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residuary legatees, but was made for the benefit and protection of the six legatees who were, at that time, under age, and because that order has been substantially obeyed by the actual payment in full of each of said legatees as he or she became entitled to payment. The purposes of the order having thus been fully met, the liability of the executor, Miller, to the residuary legatees, must depend not on the order for investment, which is *functus officio*, but on the general principles regulating the liability of executors. If Miller has not fully accounted, or if any recognized basis of liability exists, his liability must be made to appear in the ordinary manner.

The second assignment of error is sustained. The third necessarily follows the second.

The decree of the Orphans' Court is reversed
and record remitted.

APPEAL OF ELIZA J. JONES ET AL.

[JONES v. WILKEY.]

**FROM THE DECREE OF THE COURT OF COMMON PLEAS OF
FAYETTE COUNTY, IN EQUITY.**

Argued May 14, 1889—Decided May 27, 1889.

- (a) A son and daughter of a deceased person filed a bill in equity against their brother, praying that certain conveyances of property executed to the defendant by their father, a short time before his death, be declared void, on the ground of unsoundness of mind on the part of the father and undue influence on the part of the son.
1. The master found in favor of the defendant on all the issues of fact raised by the pleadings, and on exceptions filed by the plaintiffs his report was confirmed: On appeal to this court, the assignments of error raising no question of law and no error being shown in the master's findings of fact, the decree dismissing the bill at the plaintiffs' costs was affirmed.

Before PAXSON, C. J., GREEN, CLARK, WILLIAMS and MCCOLLUM, JJ.

No. 292 January Term 1889, Sup. Ct.; court below, No. 123 Equity D.

Master's Report.

On August 26, 1885, Eliza J. Jones and Henry Wilkey filed a bill in equity against Philip Wilkey, averring in substance that James Wilkey, the father of the parties plaintiff and defendant, died with weakened and impaired mind on November 7, 1883, aged 81 years; that he left surviving him a widow, Catharine, aged 78 years, and four children, to wit: John Wilkey, Henry Wilkey, Eliza J. Jones and Philip Wilkey; that said James Wilkey in his lifetime gave to his son John his full share of his estate; that the defendant Philip Wilkey became his father's agent and confidential adviser, and made use of his position as such to procure, about ten months before his father's death, deeds and transfers of almost the whole of his father's real and personal estate; that these deeds and transfers were made upon a nominal consideration, and conveyed real estate to the value of about \$22,000, and personal property to the value of about \$8,000, all of which the defendant held and retained in his possession; praying that said deeds and transfers be declared void, etc.

Answer and replication having been filed, the cause was referred to *Mr. Samuel E. Ewing*, as examiner and master, whose report filed on May 5, 1888, showing the facts and questions in controversy, was as follows:

On January 4, 1883, James Wilkey and wife, parents to the parties to this action, executed two deeds to their son, Philip Wilkey, one of which, in consideration of \$1,000, conveyed to him about 107 acres of land situate in Dunbar township, Fayette county, Pennsylvania, "to have and to hold during his natural life, for his use, and at his decease, to go to his children equally;" the other deed conveyed to him the undivided one half of a lot in Connellsville, known as the Keeper's property, in fee, for the sum of one dollar. The testimony shows said tract of land to be worth about \$100 per acre, making its value \$10,700, and said interest in the Keeper's property to be worth about \$8,000. During the same month James Wilkey assigned to said Philip Wilkey judgments, mortgages and notes, amounting in value to about \$3,850, and thirty-three shares of Youghiogheny Bridge Co. stock, estimated to be worth \$70 per share.

James Wilkey had four children, viz.: John, Henry, Eliza

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and Philip, all living. This action is brought to have the said deeds and assignments declared void.

James Wilkey, in his lifetime, had given John his proportionate share of his estate, about one fourth thereof. He had also given Henry about \$2,000, and to Henry's three sons considerable real and personal estate. He gave Mrs. Jones nine shares of stock of the Youghiogeny Bridge Company in 1881; \$200 in 1882, and the Munson note for \$1,200 in January, 1883, besides allowing her to live in his property for a number of years without rent.

On January 2, 1883, two days before the date of the above mentioned conveyances, James Wilkey entered into an agreement with Philip, whereby "In consideration of James Wilkey making a deed to Philip Wilkey for his farm in Dunbar township, and deed for a one half undivided interest in the Keeper's house, in Connellsville, as I intend the same to be, that I am to control my farm as though I still held the deed, and the proceeds of said farm I have and reserve for myself, also the rent arising from the Keeper's house, in Connellsville, during my natural life; and should his mother survive me, she to have the homestead house and all in it, and Philip to provide for his mother with all necessary comforts, viz.: money, provisions, and anything she may want for her comfort during her natural life. That in making assignments of certain judgments and promissory notes to Philip, in so doing, it is distinctly understood that Philip is to distribute and pay out the moneys arising from said judgments and notes as I may, from time to time, direct him."

It is not denied that Philip Wilkey lived near his father's house, some seventy-five yards distant, and within call, but at the same time it appears that the complainants lived within two miles of him; that they saw him often, and he visited Mrs. Jones frequently. [It does not appear that Philip was the confidential agent and trusted adviser of his father. There is nothing in the testimony which could lead to this conclusion.]¹ He no doubt assisted in carrying out the wishes of his father relative to his business affairs, but it has not been shown that he was ever advised with concerning them. Mrs. Jones would, at times, collect rents, and account to her father, for them, and Philip did also. It seems that James Wilkey transacted the

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principal part of his business without the aid of his children. During the last year or so of his life, being advanced in years, it was thought best for some one to accompany him to town. Philip, who resided nearer than any of the children, was frequently his companion, as were also James, two grandsons, the son of Philip, and the son of Henry. If James Wilkey had a confidential agent and trusted adviser, the testimony clearly shows that it was J. M. Lytle. Mr. Lytle rented his houses, collected the rents, wrote his business papers, etc. He seems to have had Mr. Wilkey's entire confidence, and was visited and consulted very often by him. [James Wilkey seems to have had a stronger mind, and to have been a better business man, than any of his children, and he was not in the habit of advising with them in regard to his business matters.]²

[The allegation that Philip alienated the kind feelings of his father from the complainants and created discord, distrust and hatred in his mind toward them, is not supported by the testimony.]³ The witness, Mrs. McSwiggen, says she "heard Philip say that Mrs. Jones oughtn't to have anything, because she would marry a smart young man that would run off with it and she would have nothing, and I heard him frequently say to his father that Henry Wilkey's children should have what was coming to him, because he had a wife that would make away with anything she would ever get;" and John Wilkey says, "I understood that Philip had told him Henry spent it," referring to the \$2,000 that James Wilkey had given Henry. Out of all the mass of testimony, this is every word which tends to show that Philip endeavored to influence his father in the disposition of his property. Philip, if he did say this, had a right to do so. There was nothing wrong in his trying to save Henry's share for his children, if he thought Henry would not take proper care of it. This was not furthering his own interests; he was not seeking to gain an advantage for himself; indeed [there is nothing to show that Philip had any influence or control over his father.]⁴ John testified that for three or four years before his father died, he had been at times requested to come and "settle him," both by his mother and Philip, and that Philip would say he couldn't get along with him, and I was the only one who could do anything with him.

There is no doubt that James Wilkey, being about 80 years

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of age at the time these deeds and transfers were made, had failed some in respect to his sight, hearing and memory, especially the former two. The evidence makes this clear. Some of the witnesses go so far as to say that he was incapable of transacting business of importance. This is merely their opinion from seeing him, and not from business intercourse with him. Mrs. Jones says his mind began to fail after his limb was broken, six years before his death, which occurred in November, 1888, but the last two or three years he was much worse, and yet in the last three years she accepted gifts from him amounting in value to over \$2,000. John Wilkey says he first noticed this failing of his father's mental ability, when he went to effect a settlement of accounts with him in 1888 or latter part of 1882. This settlement embraced accounts which had been running for many years, and because his father had forgotten payments made to him eleven years before, he says his mind had failed. In this settlement with John Wilkey, did not James Wilkey show his ability to look after his own interests? Is there a single instance given in all the testimony where James Wilkey allowed himself to be imposed upon or cheated in a business transaction?

James Wilkey was a man of strong passions. He ruled his own household, and had grown accustomed to having his own way, and when his will was crossed he became enraged. . . . In everything he seems to have known and guarded his own interests. He knew when his tenants were behind with their rents; he knew the state of his accounts with the Youghioheny Bank better than the cashier did. In all the loans he made, he took the precaution to make them secure; [and in every way, so far as the testimony shows, he acted like a sensible, prudent business man.]⁵ Richard Campbell, Esq., who had known him for forty years, and who saw him often, and transacted business with him in 1882, says he was as sound as anybody. James Blackstone, who knew him a good many years, and whose farm adjoined Mr. Wilkey's, their residences being about one third of a mile apart, says: "I would have thought that he could have done as sharp a bargain as I could, at any time I ever knew him." Kell Long, John T. Hetzel, Christian Smutz, Wm. Dunn, Conrad Hoop, James Hixon, and numerous other witnesses with whom he had business trans-

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actions, testify that Mr. Wilkey was capable of looking after his own affairs. [The weight of the evidence clearly proves the soundness of James Wilkey's mind, and all the acts attributed to him to prove otherwise, are easily explained by his failing eyesight and hearing,]⁶ and unusual irritation, brought about by such special causes as the building of a two story church and the making of a railway cut near his barn.

Because a man of failing eyesight and hearing does not recognize a member of his family, is his mind unsound? Did Mr. Wilkey ever fail to know them, or any other acquaintances, after having been told who they were? And is it not a very easy matter for an old man, in anger, when caught hold of and pressed toward the curbstone, to imagine that an effort is being made to throw him down? How did James Wilkey proceed to make distribution of his estate? Why, on January 2, 1883, he goes alone to the office of his agent, J. M. Lytle, Esq., and has him prepare an article of agreement between him, the said James, and his son, Philip, preliminary to the transfer of the said property to Philip, in which he provides he shall have control of the farm just the same as when the title was in him, and reserving to himself the proceeds of said farm and the rents of the Keeper's property; also making provision for his wife, should she survive him, and the distribution of the moneys arising from the judgments and notes. This article was written just as James Wilkey dictated it, and looks as if he knew full well what the result of his contemplated transfers would be. Following up his intention, as indicated and expressed in this article, on January 4th he directs 'Squire Lytle to prepare deeds to Philip for the real estate, which deeds are on that day, or shortly afterwards, executed and delivered, and on February 6, 1883, are recorded. Then on January 8th, he comes to Uniontown, this time in company with Philip, and makes an assignment of the judgments. [He seems to have known all the time what he was doing, for at the time he gave Mrs. Jones the Munson note, he remarked, "Now I've got nearly all my property out of my hands, and in two or three days I will have it all gone; then John can whistle for his money."]⁷

[Mr. Wilkey lived for ten months after making these deeds and assignments. He knew at this time what he had done.]⁸

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If they had been procured by undue influence; if they were not in accord with his will, he could have taken steps to avoid them, and the complainants would, doubtless, have given him their assistance in the matter. But shortly after they discovered what he had done, they instituted proceedings in lunacy against him. In this, however, they were unsuccessful.

Furthermore, it appears, from the testimony in the case, that the disposition Mr. Wilkey made of his property was substantially in conformity with the will he had executed five or six years previously. The only material difference seems to relate to Mrs. Jones. In the will he had devised her \$2,500, but subsequently he gave her in bridge stock, cash and a note, about \$2,030, and allowed her to live in the Keeper's house without paying rent. [The testimony shows no undue influence exerted by Philip Wilkey upon his father to accomplish the making of said deeds and assignments. It even shows no solicitation on the part of Philip that such a thing should be done. It seems to have been done by James Wilkey, of his own free will and accord, in the absence and without the knowledge of Philip.]⁹ [His mind was not so influenced as to render him incapable of making this disposition of his property. He had a full knowledge of his business affairs, and was still able to look after them,]¹⁰ although his intellect, by reason of his advancing age, may not have been as bright as in his younger days. [That he knew the effect of what he was doing, is evident, from his remark to Mrs. Jones, which we have before quoted.]¹¹

The cases of *Huguenin v. Baseley*, 2 Lead. C. in Eq., Wh. & T., 1156; *Nace v. Boyer*, 30 Pa. 99, and *Trost v. Dingler*, 118 Pa. 259, have among others been cited to us by counsel. The first is a very long case, and cites many authorities touching points similar to those raised in this case. The court says on page 1211: "It is nevertheless well settled that when one who, though weak and failing, is not of unsound mind, deliberately bestows his property on a child, in consideration of the latter's undertaking to provide for his support, a court of equity will not avoid the grant, if it appear that he was aware of the consequences of his act and that it could not be recalled." Also on page 1242: "All the authorities agree that weakness of mind not amounting to unsoundness or imbecility, is not a sufficient ground for setting aside a deed or will."

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With regard to the point raised by complainants as to inadequacy of consideration, we think that such considerations as are set forth in the article of agreement between James Wilkey and Philip have been regarded by our courts as sufficient, especially as between parent and child. Philip Wilkey is still acting under the terms of that agreement. His mother has the homestead house and Philip provides her with whatever she may consider necessary for her comfort. [While neither inadequacy of consideration, nor weakness of mind is alone sufficient to avoid a deed or contract, yet where these two elements exist together, it is almost certain that a court of equity will annul any deed or contract; but even in that case we think the failure of mind would have to be more marked than has been shown with respect to James Wilkey.]¹² The testimony of Mrs. Jones, Henry Wilkey and John Wilkey has been considered, and their competency as witnesses has not been passed upon, for the reason that their exclusion would not alter the conclusion arrived at. [Believing that James Wilkey made the said deeds and assignments of his own free will and accord; that he was capable of making them at the time he did so, and that he knew their full force and effect, we think the bill should be dismissed at the cost of the complainants.]¹³

To the foregoing report the plaintiffs filed twenty-one exceptions, alleging error on the part of the master.

1-13. In the several findings included in []^{1 to 13}

14-21. In not finding certain specified facts which were averred in the bill, and in not recommending that the defendant should pay the costs of the proceeding.

These exceptions having been overruled by the master, were filed with his report and renewed before the court. On November 20, 1888, the court, EWING, J., without opinion filed, dismissed said exceptions, confirmed the report of the master, and dismissed the bill at the costs of the plaintiffs, who thereupon took this appeal, assigning as error, specifically:

1-21. The dismissal of plaintiffs' exceptions to the report of the master.^{1 to 21}

Mr. Edward Campbell, for the appellants.

Statement of Facts.

Mr. R. H. Lindsey (with him *Mr. P. S. Newmyer*), for the appellee.

PER CURIAM :

The twenty-one assignments of error in this case are all to the findings of fact by the master. They do not raise any question of law for us to discuss. The learned judge below was satisfied with the master's findings, and it has not been shown here that they are erroneous.

The decree is affirmed and the appeal dismissed at the costs of the appellants.

FRANCIS MORRISON v. FAYETTE COUNTY.
ERROR TO THE COURT OF COMMON PLEAS OF FAYETTE COUNTY.

Argued May 14, 1889—Decided May 27, 1889.

1. A general statute without negative words, does not repeal a previous statute which is particular, even though the provisions of one be different from the other.
2. The act of May 12, 1887, P. L. 95, providing a fee of \$3 per day and mileage for the auditors "of each county," does not repeal the act of February 5, 1869, P. L. 117, providing a fee of \$3 per day, but without mileage, for the auditors of Fayette county.

Before PAXSON, C. J., GREEN, CLARK, WILLIAMS and McCOLLUM, JJ.

No. 334 January Term 1889, Sup. Ct.; court below, No. 289 September Term 1888, C. P.

Case stated, in which Francis Morrison was plaintiff and the county of Fayette, defendant :

August 13, 1888: It is hereby agreed between the parties in this suit that the following case be stated for the opinion of the court in the nature of the special verdict, viz.:

Francis Morrison, the plaintiff above mentioned, is one of the county auditors of the said county, elected in November,

127	110
150	159
127	110
149	343
127	110
164	261

127	110
21 SC	591

127	110
e 25 SC	273
26 SC	229

127	110
27 SC	412
127	110
215	568

Statement of Facts.

1887; that he assumed the duties of the said office and performed the same consisting of nine weeks' attendance in the months of January, February and March, 1888, at Uniontown in said county, auditing the accounts of the county officers of the said county according to the law; that the residence of the plaintiff is, by the usual mode of travel, by the railroad line, thirty-three miles distant from Uniontown, and by the county road, through the mountains, is eighteen miles distant from Uniontown; that in traveling to and from the residence of the plaintiff to Uniontown, to attend to the duties of his office, the plaintiff traveled by the said railroad route; that he did not actually travel to and from his said residence every week during the said period of nine weeks, but remained in Uniontown most of the time; that the plaintiff's claim in this case is for his mileage under the act of May 12, 1887, P. L. 95.

It is claimed by the defendant that the plaintiff is not entitled to mileage, as the act of May 12, 1887, above referred to, does not apply to Fayette county; the plaintiff's claim being stated as follows, viz.: Sixty-six miles circular at 6cts, \$3.96; 9 mileages, \$3.96 each, \$35.64, none of which has been paid him, although demand has been made for the same, and all other compensation due by the defendant to the plaintiff for or on account of the said county auditing having been paid by the defendant.

If, under the foregoing facts the court should be of the opinion that plaintiff is entitled to recover his said mileage, judgment is to be entered for the plaintiff for \$35.64, with interest from March 1, 1888; but if the court should be of the opinion that the plaintiff is not entitled to recover as aforesaid, judgment is to be entered for the defendant, the judgment in either case to carry costs and both parties to be at liberty to sue out a writ of error.

And now, to-wit: April 9, 1889, by leave of court, the case stated in the above action is amended as follows: The county commissioners claim that the act of May 12, 1887, P. L. 95, upon which the plaintiff relies to recover said mileage, does not apply to said county of Fayette, but that the auditors of said county are to be paid according to the compensation fixed by the act of February 5, 1869, P. L. 117, a special law for said county, to-wit:

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"SECTION 1. Be it enacted etc., that from and after the first day of June, one thousand eight hundred and sixty-nine, the compensation of the county commissioners and county auditors of Fayette county shall be three dollars per diem for every day necessarily employed in the discharge of their official duties;" etc.

The act of May 12, 1887, P. L. 95, is as follows:

"SECTION 1. Be it enacted, etc., that from and after the passage of this act, the auditors of each county shall be allowed, out of the county funds, the sum of three dollars each, for each and every day necessarily employed in the discharge of their duties, together with six cents per mile circular, from and to their homes, once for each and every week so employed."

On November 8, 1888, the court, EWING, J., filed the following opinion and order.

This action was instituted by Francis Morrison, one of the county auditors, for the purpose of recovering mileage under the provisions of act of May 12, 1887, P. L. 95, the county commissioners having refused to allow him such privilege, because they claim that said act does not apply to this county, but that the auditors of this county are to be paid according to the compensation fixed by the act of February 5, 1869, P. L. 117, a special law for this county. The receipt of the full compensation, prescribed by said act of 1869, is acknowledged by the plaintiff. The sole inquiry here, then, is whether or not the general law of May 12, 1887, repeals the special law of February 5, 1869, as to the compensation of county auditors.

There is no repealing clause in said later act. In *Brown v. County Commissioners*, 21 Pa. 43, it is said, that "it seems to be well settled that a general statute without negative words cannot repeal a previous statute which is particular, even though the provisions of one be different from the other." There are no negative words in the act of May 12, 1887. To the same effect is the ruling in the case of *Malloy v. Reinhard*, 115 Pa. 29, which turned upon the construction of the act of June 25, 1885, P. L. 187, which has a repealing clause excepting local laws; and the court there held that even had such repealing section been omitted, the local statutes would not have been affected. But it is argued the language of the act of 1887 is

Opinion of Court below.

so comprehensive and explicit that it shows that a repeal of all local laws on the subject was intended. That language is, "that from and after the passage of this act the auditors of each county shall be allowed;" and the language in the act of 1885, in question in the case of *Malloy v. Reinhard*, supra, is equally explicit, etc., for that act says, "that the qualified electors of each borough and township in this commonwealth shall be;" and yet it was decided that no local law was thereby repealed.

And it will not do to argue that the auditors of this county should receive as much as such officers elsewhere in the state, for the court does not fix the compensation, but the legislature. There are doubtless local laws in other counties of the state whereby the auditors of those counties receive more than is provided in the act of 1887, and the auditors of those counties would have their compensation reduced if the act of 1887 repeals the local law of this county, for then it would repeal all local laws.

Another theory: The plaintiff here does not pretend to have earned the mileage claimed by the travel of the distance named, at least the number of times mentioned, nor at all by the route claimed for; and, in any event, only mileage for the route he traveled, if shorter than the route usually adopted, and for the times actually traveled, could be claimed. These facts are not given us. It can hardly be that it was intended by the act of 1887 to give mileage when the distance was not traveled. The special law of February 5, 1869, is not set out in the case stated, as it should be, and in the order leave will be given to amend in that respect.

And now, November 8, 1888, after examination and consideration of this case, leave is given to so amend the case stated as to set out the local law of February 5, 1869, upon which defendant relies, and, therefore, it is ordered and directed that judgment be entered in said case stated, in favor of the defendant for cost of suit.

PER CURIAM.

Judgment having been entered for the defendant, the plaintiff took this writ assigning the order of November 8, 1888, as error.

Syllabus.

Mr. Edward Campbell, for the plaintiff in error.

Mr. W. G. Guiler, for the defendant in error.

PER CURIAM:

The act of February 5, 1869, fixes the pay of the county auditors of Fayette county at three dollars per day, but gives them no mileage. It was a local act, evidently passed because it was desired by that county, and has been enforced since 1869. The act of May 12, 1887, is a general law, fixing the pay of county auditors throughout the state at three dollars per day, "together with six cents per mile circular, from and to their homes, once for each and every week so employed." The present county auditors of Fayette county claim that they are now entitled to mileage under the act of 1887, but the learned judge below thought otherwise and disallowed their claim, upon the ground that the local act of 1869 is not repealed by the general law of 1887. In this we see no error. It may very well be that the auditors of Fayette county are as much entitled to mileage as are those of other counties in the state. As an abstract proposition this may be conceded. But their local law is in the way. Now that it gives them no advantage over other parts of the state they may perhaps see their way to get it repealed, in which event the general law would apply. For the present they must be content with the law as it has stood for the last twenty years.

Judgment affirmed.

J. F. BLYMYER v. WILLIAM COLVIN.

ERROR TO THE COURT OF COMMON PLEAS OF BEDFORD
COUNTY.

Argued May 15, 1889—Decided May 27, 1889.

[To be reported.]

(a) A borrower received \$5,000 giving a bond upon which judgment was entered, agreeing at the time to pay a bonus of \$300 for the loan. On

Statement of Facts.

December 19th, he gave the lender his note for \$300, the bonus agreed upon, payable in three instalments.

- (b) After payment of one instalment on the note, the borrower executed to the lender a new bond for \$5,000 secured by a mortgage, whereupon the judgment referred to was satisfied; subsequently, he paid the remaining instalments of the \$300 note.
1. In such case, the bonus represented by the note of December 19th was usurious, and in an action by an assignee of the bond and mortgage, the debtor was entitled to credit upon the mortgage debt for all the payments made upon that note: Colvin v. Blymyer, 121 Pa. 582, explained.

Before PAXSON, C. J., GREEN, CLARK, WILLIAMS and McCOLLUM, JJ.

No. 397 January Term 1889, Sup. Ct.; court below, No. 403 September Term 1887, C. P.

On August 24, 1887, a scire facias sur mortgage was issued at the suit of William Colvin, assignee of John H. Brice, against John F. Blymyer. The plea was payment.

At the trial on February 18, 1888, before BAER, P. J., there was a verdict for the defendant and judgment thereon, followed by a writ of error to No. 30 July Term 1888, Sup. Ct., wherein the judgment was reversed, and a venire facias de novo awarded: Colvin v. Blymyer, 121 Pa. 582.

At the second trial on November 26, 1888, the plaintiff put in evidence the mortgage and bond of John F. Blymyer to John H. Brice, dated December 26, 1879, for \$5,000, assigned on September 20, 1880, to William Colvin, with credits, and rested. The following facts were then made to appear:

In September, 1879, certain real estate was advertised to be sold at sheriff's sale which John F. Blymyer wished to purchase. To enable him to make the purchase, John H. Brice agreed to loan him \$5,000, to be secured by bond and mortgage upon the land when he had obtained the title. For this loan Brice was to receive a bonus of \$300. The sheriff's sale was made and the property knocked down to Blymyer. To obtain the sheriff's deed, it was then arranged that Blymyer should give his judgment note to Brice, who would advance the money and enter judgment on the note, as a temporary arrangement until the bond and mortgage could be prepared and delivered, when the judgment was to be satisfied. The judgment note for \$5,000 was executed and delivered by Blymyer to Brice on

Charge of Court below.

September 22, 1879, the whole of the \$5,000 paid by Brice to the sheriff, and on September 24, 1879,* judgment was entered on the note to No. 26 November Term 1889.

On December 19, 1879, Brice called upon Blymyer for the bonus to be paid for the loan of the \$5,000, when Blymyer not having the money, gave to Brice a judgment note for \$300, payable January 1, 1880, \$100; February 1, 1880, \$100; March 1, 1880, \$100. Judgment was not entered on this note, but it was paid off by Blymyer as follows: December 23, 1879, \$100; January 30, 1880, \$100; March 1, 1880, \$100.

On December 26, 1879, to carry out the arrangement originally made, Blymyer executed in favor of Brice a new bond for \$5,000, and a mortgage securing it upon the property purchased at sheriff's sale. This bond and mortgage were delivered to Brice on January 12, 1880, and recorded the same day. On January 13th, the judgment for \$5,000 entered to No. 26 November Term 1879 was marked as follows: "January 13, 1880. This judgment satisfied by mortgage given to me January 12, 1880. JOHN H. BRICE." On September 20, 1880, Brice assigned the bond and mortgage to William Colvin, the plaintiff in this suit, who purchased without inquiry of the mortgagor. Blymyer paid to Colvin the debt and interest upon the bond and mortgage, less credit claimed for the payments made on the note of December 19, 1879, for \$300.

The court, BAER, P. J., charged the jury as follows:

The plaintiff in this suit seeks to recover a balance due on a judgment, amounting at this time, as he claims, to \$185.92.

This case was tried before, and then the controversy was as to three payments of \$100 each, which had not been allowed. We directed the jury then to give credit for those three pay-

* In the paper book of the plaintiff in error in *Colvin v. Blymyer*, 121 Pa. 582, an offer appears in the testimony printed as follows: "I now offer judgment 24th December, No. 26 December Term, 1879." And in the History of the Case in the same paper book the note of September 22, 1879, is copied and followed with this remark: "Upon this note judgment [was] entered in the Court of Common Pleas on the 24th day of December 1879, and there remained until satisfied without any objections from any quarter." In other parts of the "History," the date of the entry of the judgment is given as September 24, 1879. See *Matt. XVIII: 7*.

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ments, because, though they were called a bonus, they were in reality money paid as usury. The Supreme Court affirmed us as to this being usury, but they say we erred in allowing \$300 instead of \$200, inasmuch as the first \$100 paid, though usury, could not be set off as a payment in this judgment. But as to this, the counsel for the defendant holds that the Supreme Court were led into error by a misprint in the paper books, and now contends that he is entitled to have a credit for the \$100 excluded by the Supreme Court.

From the opinion of that court an error does appear. It was assumed by that court that the original judgment for \$5,000 was entered on December 24, 1879, and that the \$100, now contended for, was paid the day before the entry; whereas in point of fact the judgment was entered three months earlier, namely, on September 24, 1879, and before the \$100 were paid.

We need not inquire whether the court above based its ruling upon the fact there appearing, the payment of the \$100 before the entry of the judgment, or on the apparent fact that it was paid before the judgment was marked satisfied, because we are not a court of error, but that court is. They can supervise our rulings; we cannot supervise theirs. [Therefore, as they held that this court should have instructed the jury that the defendant was only entitled to a credit for two payments made, namely, one on January 30, 1880, and one on March 1, 1880, of \$100 each, we must and now do instruct you that the defendant is only entitled to credit for the two payments of \$100 each, which were made, respectively, on January 30, 1880, and on March 1, 1880; and that, after applying these credits to the amount appearing due after all the undisputed credits have been allowed, the plaintiff will be entitled to a verdict for such sum as remains unpaid, interest being computed until this day.]¹

[A calculation is made which shows a balance of \$185.92. The plaintiff's calculation seems to be correct, on the basis of this charge, and your verdict must, therefore, be for the plaintiff for the amount found to be unpaid, which is \$185.92.]²

If the Supreme Court assumed facts which were erroneous, and if it affected their ruling, the defendant will have a standing in that court, on motion for a modification of its decree, though he may lose his case here.

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The jury returned a verdict for the plaintiff for \$185.92.

A rule for a new trial having been discharged, judgment was entered on the verdict, when the defendant took this writ, assigning for error:

1, 2. The portions of the charge included in [] ¹ *

Mr. Alexander King, for the plaintiff in error.

Counsel cited: *Earnest v. Hoskins*, 100 Pa. 551; *Campbell v. Sloan*, 62 Pa. 481; *Schutt v. Evans*, 109 Pa. 625; *Montague v. McDowell*, 99 Pa. 265.

Mr. John Cessna (with him *Mr. M. A. Points*), for the defendant in error.

Counsel cited: *Bly v. Second N. Bank*, 79 Pa. 453; *Hopkins v. West*, 83 Pa. 109; *Rutherford v. Boyer*, 84 Pa. 347; *Montague v. McDowell*, 99 Pa. 265.

OPINION, MR. JUSTICE CLARK:

When this case was here before, 121 Pa. 582, the paper book of the defendant in error* erroneously stated that the judgment on the original \$5,000 bond had been entered December 24, 1879, and the judgment of this court was founded upon the assumption that this was the correct date of its entry. The correction of this error places the \$100 paid December 23, 1879, upon the same footing as the succeeding payments of \$100 each, made January 30 and March 1, 1880, respectively.

All of these three payments were made after judgment had been confessed on the original bond; and, as the \$300 note, given as a bonus, must be treated as a device to evade the usury laws, these payments upon it must be treated as payments upon the original debt. The bond and mortgage were given for the same debt as the judgment; the transaction was a mere change of securities for the same loan, and the law will apply the payments of usurious interest as payments upon the principal. Had this error of counsel, or of the printer, as the case may be, been called to our attention, we would have modified our opinion, and entered a judgment in accordance with the real facts of the case.

The judgment is reversed, and a venire facias de novo awarded.

*Plaintiff in error, in that case.

Statement of Facts.

COUNTY OF FAYETTE v. GEORGE LAING.

ERROR TO THE COURT OF COMMON PLEAS OF FAYETTE
COUNTY.

Argued May 15, 1889—Decided May 27, 1889.

- (a) A contract, whereby plaintiffs covenanted to erect County Home buildings for a stipulated sum, provided for authorized changes to be made in the work and materials when necessary, and for a reference of any disagreements between the parties to the conclusive decision of the architect.
- (b) The plaintiffs claimed completion of the building according to the contract, and the county claimed deductions for deficiencies in work and materials, but no reference of the matters in dispute was ever made to the decision of the architect.
- (c) The plaintiffs brought suit to recover the balance claimed, and on the trial the judge submitted the question of fact to the jury, instructing that the duty to refer disputes to the architect for settlement was mutual, and defendant could not take advantage of its own neglect.
- 1. On error, it was held that there was no such error apparent in the record as would justify a reversal of the judgment for the plaintiffs; that, while the architect had made no formal award, he had practically settled the matters in dispute, and as he was now dead it would do no practical good to reverse because no such formal award had been made.

Before PAXSON, C. J., GREEN, CLARK, WILLIAMS and McCOLLUM, JJ.

No. 415 January Term 1889, Sup. Ct.; court below, No. 82 March Term 1885, C. P.

On December 29, 1884, W. F. Patterson and John M. Kuhn, partners under the firm name of Patterson & Kuhn, brought covenant against the county of Fayette, to recover a balance claimed upon a contract entered into by them for the erection of County Home buildings. The defendant pleaded, covenants performed absque hoc. On June 11, 1886, George Laing, assignee of the plaintiff firm for the benefit of creditors, was substituted as plaintiff upon the record.

At the trial on February 25, 1889, before HAZEN, P. J., 17th district, holding special term, it was made to appear that on

Statement of Facts.

June 14, 1883, Patterson & Kuhn entered into a written agreement with the county commissioners whereby they agreed to build the County Home buildings according to printed specifications and conditions which were made a part of the contract, for the sum of \$90,000. The contract provided that necessary changes could be made in the work and materials, and that the amount to be added or deducted from the contract price, on account of authorized changes, was to be determined by the architect, and that any disagreements or differences between the contracting parties should be referred to and decided by the architect, whose decision should be final and conclusive upon the parties. Patterson & Kuhn claimed complete performance of the contract and the right to recover a balance of \$8,500; the commissioners claimed that the work and materials, were not in accordance with the contract; but neither of the contracting parties had offered to refer the disputed matters to the decision of the architect. The architect was dead at the time of the trial, but it was shown that before his death he had given to Patterson & Kuhn the following certificate:

“UNIONTOWN, December 12, 1884.

“Commissioners of Fayette County, Pa.

DEAR SIRS: Messrs. Patterson & Kuhn having substantially completed the erection of new county home building, but the building not being formally accepted by the Board of Commissioners, I respectfully recommend the payment of three thousand five hundred dollars, being a purpart of last payment of twelve thousand dollars.

J. W. DRUM,
Architect.”

The court submitted to the jury all the questions of fact arising, and instructed as to certain positions taken by the defendant as follows:

The defendant has asked the court to instruct you upon the following points.

1. That under all the evidence the plaintiff is not entitled to recover.

. Answer: This is not affirmed.¹

4. If the jury find from the testimony that the architect was to be the final arbiter of any dispute under the contract, and that the amount claimed in this suit or any part thereof was in dispute and no effort was made by the said Patterson & Kuhn

Opinion of the Court.

to refer the same to the said architect, nor was such reference made, the plaintiff is not entitled to recover.

Answer: This is not affirmed as a whole. The duty to refer disputes to the architect under this contract being mutual, defendant cannot take advantage of its own neglect of a mutual duty to the detriment of its adversary. And further, it is a question for the jury, from all the proofs in the case, to determine whether or not the architect did not find and certify as a fact that there had been a substantial compliance with and completion of the contract by the contractors.²

The jury returned a verdict for the plaintiff for \$4,990. Judgment having been entered, the defendant took this writ, assigning as error, inter alia:

1, 2. The answers to the defendants points.^{1 2}

Mr. W. G. Guiler (with him *Mr. A. D. Boyd*), for the plaintiff in error.

Mr. R. H. Lindsey, for the defendant in error.

PER CURIAM:

An examination of the numerous specifications discloses no such error as would justify us in reversing this judgment. The objection that there was no formal submission of the subjects of dispute to the architect, loses much of its force in view of the fact that, although he made no formal award, yet he practically settled them. As the architect is now dead it would do no practical good to reverse the case upon such a question as this. It was a case for the jury and we see no reason why the judgment should not stand.

Judgment affirmed.

Opinion of Court below.

THOS. J. MILLER v. COMMONWEALTH.

ERROR TO THE COURT OF COMMON PLEAS OF UNION COUNTY.

Argued May 15, 1889—Decided May 27, 1889.

The surety on the recognizance of a defendant convicted of desertion, conditioned that the defendant will pay a weekly sum for the support of his wife, cannot be absolved from liability by an offer to surrender the body of the principal: the obligation of the recognizance is voluntary and can be discharged only by payment according to its terms.

Before PAXSON, C. J., GREEN, CLARK, WILLIAMS and McCOLLUM, JJ.

Nos. 16, 17 July Term 1889, Sup. Ct.; court below, Nos. 41, 42 March Term 1888, C. P.

On January 23, 1888, two several actions in assumpsit were brought in the name of the Commonwealth as plaintiff, against Thomas B. Miller and Thomas J. Miller as defendants, the statement of claim filed in each case charging a liability of the defendants upon a recognizance entered into in the Court of Quarter Sessions of Union county, in a proceeding wherein Thomas B. Miller had been adjudged guilty of wife desertion and sentenced to pay the costs of prosecution and a certain sum per week towards the support of his wife, the complainant.

The writ was returned *nihil habet* as to Thomas B. Miller, but served upon Thomas J. Miller, who appeared and in each case filed an affidavit of defence. The plaintiff took rules for judgment for want of sufficient affidavits of defence.

The nature and character of the defence made, sufficiently appears from the opinion of the court below, BUCHER, P. J., filed on March 11, 1889:

Proceedings were instituted by the wife of Thomas B. Miller against him in the Quarter Sessions for desertion, under the act of April 13, 1867, P. L. 78. After hearing had, the husband was adjudged guilty of deserting his wife, and was sentenced to pay her a certain stipend per week. He entered

Opinion of Court below.

into recognizance with his father, Thomas J. Miller, as his surety, to comply with the order of the court. Subsequently to this, the wife applied to the Sessions for an increase of the allowance, which after hearing had was granted, and the defaulting husband, Thomas B. Miller, was sentenced to pay this increase, and he entered into a second recognizance with his father as surety to pay the sentence of the court. Default having been made in the payments as provided in the recognizances, separate suits were brought against the recognizors upon each recognizance. Thomas J. Miller, the surety, filed affidavits of defence. We have, then, two cases which are controlled by the same legal principles and can for that reason be disposed of together.

It is alleged that the affidavits of defence are insufficient to prevent judgment. The ground of defence set up in the affidavits is, "that the said recognizance becoming burdensome to your deponent (defendant), he produced the body of the said Thomas B. Miller before the Court of Quarter Sessions of Union county, and by his petition to the said court setting forth the facts as aforesaid offered to surrender the said Thomas B. Miller into custody for the purpose of relieving him of his recognizance; that the said court declined to permit the petition to be heard and declined to permit your deponent to surrender the said Thomas B. Miller into custody in relief of his recognizance, but held that the recognizance could not be discharged in any other way than by payment of the same; and your deponent averring that he will prove on the trial the offer and refusal of the surrender of the principal into custody, as above set forth, says it works a discharge of your deponent from the recognizances set forth in plaintiff's statements."

In motions like the present we are to assume that the defendant can and will prove at the trial all the facts set up in the affidavit; nevertheless, it may be permitted us in our own vindication to say that the allegation that the court declined to permit the petition to be heard is a mistake, as the records of the Quarter Sessions fully attest. The record shows that no petition was presented, but a paper was read and handed up to the court which reads thus:

"And now, Sept. 21, 1887, T. J. Miller bail in the sum of two hundred dollars for the compliance by Thomas B. Miller, the

Opinion of Court below.

defendant in the above cause, with the sentence of the court in said case imposed, moves the court to direct the prothonotary to issue to him a bail piece to arrest, detain and surrender the said Thomas B. Miller, according to the act of assembly in such case made and provided." Indorsed: "Eo Die, the court refuses the application; to which T. J. Miller excepts, and bill sealed at his instance." Our only apology for this digression is to relieve ourselves of the imputation that we refused to hear the petition.

We come now to consider the merits of the affidavits stripped of all verbiage. The affidavit sets up as a ground of defence that defendant became surety for Thomas B. Miller, who had been ordered to pay a stipend to his wife, whom he had deserted, and that, having paid a portion of the stipend which by his recognizance he agreed to do, he became weary of paying more, and that his offer to surrender his principal to jail was a satisfaction of the recognizance. If recognizances entered into in desertion cases can be satisfied and paid in this way, there would be no advantage in taking them, other than to enable the principal debtor and his surety to select the most fitting season of the year for the former to serve his time in jail. The defendant was not bound to enter into the recognizances. He did it voluntarily and by the very terms of the obligation he could only absolve himself by payment and not by the surrender of the body of his principal to the common jail. In *Commonwealth v. Gaul*, 2 Wood. Dec. 70, it is said: "It was the manifest purpose of the criminal procedure act of March 31, 1860, to give the surety of the defendant in a criminal prosecution the right to a bail piece only while the original complaint was pending and undetermined, and before a final liability on the part of the surety had been incurred." Such a bail piece was held to be a sufficient warrant or authority for the proper sheriff or jailer to receive the said principal and have him forthcoming to answer the matter or matters alleged against him. It was also held in *Directors of the Poor v. Dungan*, 64 Pa. 402, that the surety of a party sentenced for bastardy could not absolve himself from liability save by payment. *Commonwealth v. Jones*, 90 Pa. 432, does not sustain the contention of the defendant. It simply decides that the Quarter Sessions has power to modify orders

Opinion of the Court.

and decrees in desertion cases, and that such action cannot be reviewed in the Supreme Court. To the same effect is Philadelphia City v. Owens, 12 W. N. 292. If we give to these cases their full force and effect it will not aid the defendant. We know of no statute or rule of law which requires the court, at the instance of a surety in a desertion case, to accept the body of the defendant in satisfaction of the recognizance. If there be such statute or rule, it looks to us that application must be made in the Sessions, and if refused there it must stand until reversed in the Supreme Court. Reversal cannot be had by overhauling in the Common Pleas the decree made in the Sessions, as is attempted here. The affidavits disclose no ground of defence and the rules must be made absolute.

Judgments having been entered against the defendant (in what form or in how much did not appear in the paper books), the defendant took these writs, assigning for error:

1. The Court of Common Pleas had no jurisdiction in the cases, as the recognizances had not been forfeited.
2. The court erred in making the rules for judgment for want of sufficient affidavits of defence absolute.

Mr. Andrew H. Dill (with him *Mr. E. M. Beale*), for the plaintiff in error.

Mr. J. Merrill Linn (with him *Mr. J. F. Duncan*), for the defendant in error.

PER CURIAM:

The judgment in each of the above cases is affirmed upon the opinion of the learned judge of the court below.

Judgment affirmed.

C. R. JAMES, TO USE v. GEO. NOAKER, ET AL.

ERROR TO THE COURT OF COMMON PLEAS OF UNION COUNTY.

Argued May 15, 1889—Decided May 27, 1889.

Before PAXSON, C. J., GREEN, CLARK, WILLIAMS and McCOLLUM, JJ.

No. 72 July Term 1889, Sup. Ct.; court below, No. 38 March Term 1886, C. P.

On February 5, 1886, a writ of scire facias sur mortgage was issued by C. R. James, to use of Ann W. James, against George Noaker and Catharine Noaker. On March 20, 1886, the defendants filed an affidavit of defence and afterward a supplemental affidavit of defence, the two setting out in many pages a complicated series of facts and accounts claimed to affect their liability on said mortgage. The plaintiff entered a rule for judgment for want of a sufficient affidavit of defence, which rule after argument was discharged, the court, BUCHER, P. J., filing no opinion. Thereupon the plaintiff took this writ, assigning as error the order discharging the rule for judgment.

Mr. J. Merrill Linn, for the plaintiff in error.

Mr. Samuel H. Orwig, for the defendant in error.

PER CURIAM:

We think the affidavit of defence was sufficient to carry the case to the jury. As it may come up again we refrain from any discussion of it at present.

Order affirmed.

APPEAL OF THOMAS S. LEWIS.

[ESTATE OF JOHN L. LEWIS.]

FROM THE DECREE OF THE ORPHANS' COURT OF UNION
COUNTY.

127	127
150	350
127	127
181	190
127	127
1212	429

Argued May 15, 1889—Decided May 27, 1889.

The finding of an auditor, that an heir at law had been advanced by the decedent in the purchase of a farm the deed for which was made directly to the son, being based upon sufficient evidence and approved by the court, the decree confirming the report, etc., will not be reversed.

Before PAXSON, C. J., GREEN, CLARK, WILLIAMS and McCOLLUM, JJ.

No. 434 January Term 1889, Sup. Ct.; court below, number and term not given.

On May 20, 1869, John L. Lewis died intestate, leaving no widow but five children, as his heirs at law. After unsuccessful proceedings by bill in equity to enforce an alleged family arrangement and disposition of the property, partition proceedings were instituted in the Orphans' Court, wherein the real estate of the decedent was divided, accepted at the valuation by certain heirs entitled, and awarded to them by formal decrees, upon their entering into recognizances conditioned to pay the costs of partition and the amount of owelty due to Thomas S. Lewis, to whom no award of land was made. Thereupon, one of the acceptors came into court and filed a petition setting forth that Thomas S. Lewis, in the lifetime of his father, had been advanced by the latter in the purchase of two parcels of real estate. One of these parcels was known as the Kelly farm which, as was alleged, had been purchased by John L. Lewis in his lifetime for \$6,594, all of the purchase money being paid by him, except \$1,800 remaining as a dower principal for the protection of the widow of Joseph Kelly, deceased, and the deed made to Thomas S. Lewis.

On September 24, 1887, *Mr. Alfred Hayes* was appointed

Auditor's Report.

auditor to ascertain, inter alia, "as to whether there be any owelty due Thomas S. Lewis, as one of the heirs of John S. Lewis, deceased, after the advancements shall be duly charged." On September 17, 1888, the auditor submitted his report, which so far as relating to the subject matter of this cause, was as follows:

* * * * *

Considering these questions in their order, the first matter for determination is whether any advancements were made to the heirs of John L. Lewis by said decedent in his lifetime, and if so to whom, and to what extent.

An advancement is defined to be "a pure and irrevocable gift by a parent in his lifetime to his child, on account of such child's share of the estate after the parent's decease:" *Brightly's Eq.*, 389. "An advancement is an irrevocable gift by a parent to a child of the whole or part of what it is supposed the child will be entitled to on the death of the parent intestate:" *Eshleman's App.*, 74 Pa. 42. "Advancement is a question of intent. That intent must be proven to have existed at the time of the transaction and by the contemporary acts and declarations of the parties:" *Merkel's App.*, 89 Pa. 340. If a parent purchase land in the name of his son, it is prima facie an advancement: *Phillips v. Gregg*, 10 W. 158. "Where a father conveys land to a child it is prima facie an advancement, and this question may be settled after a partition of the father's remaining real estate, in the distribution of the value thereof:" *Dutch's App.*, 57 Pa. 461. "Where real estate is conveyed by a father to a child, the legal presumption is that it is intended to be an advancement. To overbear this presumption there must be proof of distinct explanatory facts. Thus, it was ruled in *Dutch's App.*, 57 Pa. 461, that a conveyance of land by a father to a child directly, or by payment of the purchase money and having the deed made to the child, is prima facie an advancement, and this presumption is greatly strengthened when the value of the land bears any considerable proportion to the father's whole estate:" *Storey's App.*, 83 Pa. 97. "In the absence of direct evidence accompanying a gift, the question of advancement must be determined from a consideration of the surrounding facts:" *Knabb's Estate*, 30 Leg. Int. 361. A difference seems to be recognized between advancements in

Auditor's Report.

land and advancements in money, as to their proof. "If a parent conveys land to the child from considerations of love and affection only, or pays the purchase money of land conveyed by another to the child, the law presumes it an advancement though not conclusively; but where personal chattels or money are delivered to the child or paid for him, there must be evidence of an intention to make an advancement beyond the unexplained act of delivery or payment:" *Miller's App.*, 40 Pa. 61.

* * * * *

It is possible that John L. Lewis paid all the purchase money of the Clingan farm with his own funds, but it is also possible that he did not do so. To say the least, there is manifestly an insufficiency of evidence to warrant a finding that the undivided one half of the Clingan farm was an advancement to Thomas S. Lewis, and the auditor therefore concludes that it was not.

We now come to a consideration of the same question, as it relates to the Kelly farm.

It is to be borne in mind that the declarations made by the father, at the time the alleged advancement was made, are competent and extremely important in a determination of the question involved; and nothing is better settled than that the subsequent acts and declarations of the parent cannot be admitted as evidence in his favor, although those of the child may be so used: See *King's Est.*, 6 Wh. 370; *Miller's App.*, 40 Pa. 57; *Yundt's App.*, 13 Pa. 575; *Batton v. Allen*, 43 Am. Dec. 630.

The only declarations and acts of John L. Lewis which seem to be contemporaneous with the alleged advancement and part of the *res gestæ* are those testified to by Rev. S. W. Ziegler and by Philip Stahl, the administrator of the estate of Joseph Kelly, deceased.

In his testimony taken by the master in the equity proceedings the former says: "In the spring of 1861, the Joseph Kelly place was for sale. Thomas Lewis was desirous of having it and asked his father to buy it for him, giving as a reason that it had good timber on it, and a saw mill on which more could be made than on the farm. He talked also of leaving him if he did not get it. Father told him and I to go out and bid on it, not to bid too high. We went out and attended the sale

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and bid it in for \$31.40 per acre. We thought we had a bargain." In the present audit he testifies: "When the Kelly farm was purchased I was along. Thomas S. Lewis was with me. I had orders and instructions from John L. Lewis as to that purchase. The instructions were to both Thomas S. and myself. He told us to go out and bid, but not to go too high. Thomas did the bidding; we consulted together. There were a number of bids. We finally went to \$31.40 per acre. We bought it for John L. Lewis. John L. Lewis paid for it. The deed was made to Thomas S. Lewis." On cross examination, he states that he was present once at James F. Linn's office when John L. Lewis made a large payment of the purchase money of the farm.

Philip Stahl says: "About a week before the sale John L. Lewis and Thomas S. Lewis came out and saw me, and said that he wanted to buy a farm for his son Thomas, or Tommy, as he called him. John L. Lewis was the purchaser, his son and son-in-law were at the sale and gave in the name of John L. Lewis as the purchaser. . . . The deed was made to his son Tommy and John L. Lewis paid the money." He also states that all the purchase money that was paid was paid to him in the office of James F. Linn, Esq., and that it was all paid except the dower. Speaking of the payment of \$2,000, by John L. Lewis, at James F. Linn's office, he says that Mr. Thomas S. Lewis was present; "I don't know where Mr. Lewis said he had got that money, but I understood him that he had sold property up in Centre county, and had got the money there."

* * * * *

The return of sale by Philip Stahl to the Orphans' Court; the deed for the Kelly farm; the obligations given for the purchase money unpaid; the securing of the widow's dower, \$1,802.71 (yet unpaid), disclose the name of Thomas S. Lewis alone as vendee and obligor, but there is nothing in this which is inconsistent with the idea of the purchase of a farm by the father for the son. Nor does the auditor understand that it is essential to constitute an advancement in land, where the title is taken in the name of the son, that the whole amount of the purchase money must necessarily be paid by the parent. In *Phillips v. Gregg*, 10 W. 172, it is ruled that "if a parent pur-

Auditor's Report.

chase land in the name of the son, and pay only part of the purchase money, it will not be pretended that the son is bound to bring into hotch-potch more than the amount paid."

* * * * *

In the opinion of the auditor, the testimony of Philip Stahl is the controlling evidence bearing upon the question of advancement, the other parol testimony upon that subject, as also that relative to admissions, being of a persuasive or corroboratory character.

The facts appear to show that Thomas S. Lewis was desirous of having the Kelly farm; that he insisted strongly upon his father buying it for him, even intimating to him that he would leave him if he did not get it; that John L. Lewis and his son Thomas called on Mr. Stahl before the sale, and the former told Mr. Stahl, who had the farm for sale, that he wanted to buy a farm for his son Tommy; that instructions were given by old Mr. Lewis to his son Thomas and his son-in-law Mr. Ziegler to go to the sale and bid upon the property; that they did attend the sale, and consulted together, Thomas doing the bidding, and that the farm was finally struck off at \$31.40 per acre, and the name of John L. Lewis given in as the purchaser; that when the parties afterwards met at the office of James F. Linn, Esq., who was the attorney for Philip Stahl, the administrator, John L. Lewis who at that time was about 83 years of age, and his son Thomas S. Lewis came there together; that John L. Lewis paid all the purchase money as to the payment of which any direct testimony has been given, and stated that he was buying the land for Tommy, and had the deed made to Thomas S. Lewis.

These facts are sufficient, in connection with the persuasive evidence before referred to, in the opinion of the auditor, to raise the presumption, that whatever John L. Lewis paid of the purchase money of the Kelly farm, there was an advancement made to Thomas S. Lewis to that extent, and the burden lies upon Thomas to rebut this presumption, as ruled in Dutch's App., 57 Pa. 465.

Should it be claimed that under the facts there is a strong presumption that after the property was knocked off to John L. Lewis, as is the sworn testimony of both Mr. Stahl and Mr. Ziegler, arrangements were made between him and Thomas, by

Auditor's Report.

which the latter became the purchaser, and that the money paid by the father was in reality the money of Thomas, it can be answered, that if this were so, the presence of John L. Lewis would hardly have been needed at the office of James F. Linn, Esq., and it would have been more likely that Thomas should have had the custody of his own money, rather than his aged and infirm father; besides, we meet the further objections springing from the testimony of Philip Stahl, in that the latter says: "I understood him, John L. Lewis, that he had sold property up in Centre county, and had got the money there."

Finding then that what John L. Lewis paid out of his own funds on the Kelly farm was an advancement to his son Thomas, the question recurs, how much of the purchase money did he so pay for him? The auditor would place the amount at \$4,791.29, being the difference between the whole amount of the purchase money of the farm, to wit, \$6,594, and the dower money yet unpaid, to wit, \$1,802.71, if it were not for certain other testimony produced.

[Considering other testimony and documentary evidence adduced upon the subject of the amount paid in the purchase of the Kelly farm by John L. Lewis, the auditor concluded:]

The auditor is inclined to limit the amount which he finds to be an advancement, to such sum only as is clearly justified by the testimony; and therefore, as his conclusion, he finds that Thomas S. Lewis was advanced by his father John L. Lewis, in the farm known as the Kelly place, to the amount of \$3,000.

To the report of the auditor made in accordance with the foregoing findings, Thomas S. Lewis filed exceptions, inter alia, that the auditor erred:

2. In finding as a matter of fact that Thomas S. Lewis was advanced \$3,000 in the Kelly farm.¹

3. In finding that Thomas S. Lewis was advanced to more than his share in the real estate, and not entitled to owelty in the recognizance.²

4. The auditor erred in not adding the personal estate to the fund from the real estate, and in not bringing the entire estate, both real and personal, into a hotch-potch, before dividing the estate into shares due the heirs, to ascertain if Thomas S. Lewis was advanced more than his share.

Opinion of the Court.

Said exceptions having been argued, they were dismissed on March 11, 1889, the court, BUCHER, P. J., saying:

A careful reading of the testimony, as well as the auditor's report, satisfies us, that the latter needs correction, in one particular only. The objection that "the auditor erred in not adding the personal estate to the fund from the real estate, and in not bringing the entire estate, both real and personal, into hotch-potch, before dividing the estate into shares due the heirs, to ascertain if Thomas S. Lewis was advanced more than his share," is not well taken. The auditor had nothing to do with the personal estate. The accounts of the administrators of the personal estate are not yet settled and determined, and it will be ample time to determine the interest of the parties in that fund when this is done. The sole question before the auditor, as to advancements, had relation to the real estate, and the report is only conclusive as to advancements, so far as the real estate is concerned.

Thereupon the exceptant took this appeal assigning as error:

- 1, 2. The dismissal of the foregoing exceptions.¹ *
3. The confirmation of the auditor's report.

Mr. Andrew H. Dill (with him *Mr. E. M. Beale*), for the appellant.

Mr. Samuel H. Orwig (with him *Mr. J. Merrill Linn*), for the appellees.

PER CURIAM:

The only question here is whether the auditor erred in finding that Thomas S. Lewis, the appellant, was advanced three thousand dollars in the purchase of the Kelly farm. This is a question of fact and the finding was against the appellant. The learned Orphans' Court sustained the auditor, and the case is now here upon appeal. We are asked to reverse both the court and the auditor upon a question of fact. It may be that the finding might have been the other way, but we are not prepared to say it should have been. There was evidence, and we think sufficient evidence, to sustain the finding.

The decree is affirmed and the appeal dismissed at the costs of the appellant.

127 — 134
21 SC * 71

APPEAL OF CHARLES HOWER ET AL.

[SELIN'S-GROVE WATER CO. v. BOR. OF SELIN'S GROVE.]

FROM THE ORDER OF THE COURT OF QUARTER SESSIONS OF
SNYDER COUNTY.

Argued May 16, 1889—Decided May 27, 1889.

1. Where, in a proceeding by a creditor in the Court of Quarter Sessions under the act of April 22, 1887, P. L. 61, to enforce by mandamus the collection of a special tax sufficient to pay an indebtedness alleged, the petition of citizens and taxpayers of the borough for leave to intervene is refused, the petitioners have no standing to be heard upon the matter on appeal or certiorari in the Supreme Court.
2. When, in such a proceeding, the borough files an answer admitting the indebtedness but averring that the treasury is empty and that the revenues which the borough may lawfully raise by taxation in any one year are inadequate to meet the claim, such admission is equivalent to a judgment in favor of the petitioner, and will entitle him to a decree in his favor: per BUCHER, P. J.
3. The right of a citizen and taxpayer of a borough, to become a party to any suit or process pending against the borough, etc., under the provisions of the act of March 23, 1877, P. L. 20, exists only where the proceedings in which he applies to intervene are instituted in the Court of Common Pleas: per BUCHER, P. J.

Before PAXSON, C. J., GREEN, CLARK, WILLIAMS and
MCCOLLUM JJ.Nos. 33, 34 July Term 1889, Sup. Ct.; court below, No. 7
February Term 1888, Q. S.

On April 27, 1888, the Selin's-Grove Water Company, a corporation duly created for the purpose of supplying the inhabitants of the borough of Selin's-Grove and vicinity with water, presented its petition, averring that it had made a contract with the burgess and town council of Selin's-Grove to furnish water, etc.; that it had been supplying said borough with water since February, 1886, and that under said contract \$1,150 fell due annually to said petitioner; that there was due thereon up to April 1, 1887, a balance of \$894.16, and on April 1, 1888, the additional sum of \$1,150; that payment had been demanded of

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the borough authorities, but they claimed that said borough had no funds with which to pay said water company, and that it required the full amount of tax said borough was authorized to collect under its charter, in any one year, to meet the current expenses of said borough; praying the court "after ascertaining by proper means the amount of such indebtedness of said borough, by writ of mandamus to direct the proper officers of the borough to collect by special taxation an amount sufficient to pay the same," etc.

On the same day, the answer of the burgess and town council was filed, admitting the allegations of said petition.

On May 28, 1888, Charles Hower, G. Schnure, and one hundred others, citizens and taxpayers of the borough, presented their petition denying the validity of the claim made by the water company, and, averring, inter alia, that said burgess and certain members of the town council were interested, directly or indirectly in said water company, at the time the contract was made with it to supply said borough with water; that the water works were defective and not constructed in accordance with the stipulations of the contract, and that collusion existed between the borough authorities and the water company to fasten an unjust debt upon the borough; praying that the writ of mandamus be refused until the validity of the claim of said water company should be determined in a proper forum, and that they might be admitted to intervene as parties defendant in the mandamus proceedings instituted.

On July 26, 1888, the court, BUCHER, P. J., filed the following opinion:

This is an application on the part of the Selin's-Grove Water Company for a mandamus to compel the authorities of the borough of Selin's-Grove to lay a special tax in order to pay the indebtedness of said borough to said water company.

* * * * *

As we have already observed, the petition is predicated upon the act of April 22, 1887. That act contains but one section, and reads thus: "That when it shall be shown to the Court of Quarter Sessions of any county of this commonwealth that the debts due by any borough in said county shall exceed the amount which the proper officers may collect in

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any one year by taxation, as at present regulated, or when the proper officers refuse or neglect to levy a sufficient tax to pay the same, it shall and may be lawful for the said court, after ascertaining, by proper means, the amount of such indebtedness of any particular borough, to collect by special taxation an amount sufficient to pay the same, in one or more annual instalments, as may be adjudged reasonable by said court, during such years as may be required for the payment of the same." The language of this act is plain and intelligible. It speaks no uncertain sound. It makes it the duty of the Court of Quarter Sessions to ascertain by proper means the amount of indebtedness of the borough, and when the debts of the borough, other than the bonded debts, shall exceed the amount which the proper officers may collect in any one year by taxation, as at present regulated, to award a mandamus commanding the borough officers to levy a special tax for the payment of the indebtedness.

From the petition and answer we gather that the debt is due and owing, which is sought to be discharged by a special tax; that this indebtedness, other than the bonded debt, exceeds the amount which may be collected under existing laws in any one year, to wit, 5 mills on the last valuation of property liable to taxation for borough purposes. Under these facts it looks to us as if our duty was plain to award the writ and order a special tax to be levied.

Upon the presentation of the petition and answers, Messrs. Wolfe & Leiser, representing a large number of the taxable inhabitants of said borough, protested against the allowance of the writ, and asked for time to present their objections to the same. This was allowed and the hearing postponed. Afterwards, upon the hearing, many taxpayers of the borough, respectable, not only in point of numbers, but in the pecuniary interest which they had in the question, by reason of the property liable to be affected by the decree for a tax, presented a petition to the Quarter Sessions, in which they denied the validity of the debt sought to be collected, by reason of the alleged fraud and covin of the burgess and certain members of the town council. This petition averred, inter alia, that certain members of the town council were stockholders in the water company at the time the contract was made with it to supply

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the borough with water; that the works were defective and not constructed in accordance with the stipulations of the contract, and that collusion existed between the borough authorities and the water company to fasten an unjust debt upon the borough. The petitioners demand the right of the taxables to interfere in the present proceedings.

Is this contention sound? It is admitted that there is no common law right thus to interfere, but it is urged that the act of March 23, 1877, P. L. 20, gives the right. An inspection of that act tells us in unmistakable language that the right to interfere by the taxpayers only exists where the proceeding is instituted in the Common Pleas. Here the proceeding is in the Quarter Sessions, and the statute does not extend to such case. The act of 1887, upon which the proceeding is founded, simply extends the provisions of an act entitled "An act relating to the collection of district and township debts," approved March 21, 1864, P. L. 162-63, to boroughs. The language of the two acts is almost identical, save that the word "borough" in the latter act is substituted for "township" in the prior one. It was decided in *Lehigh Coal & Navigation Co.'s App.*, 112 Pa. 360, that the proceeding to interfere on the part of the taxpayers was confined by the act of March 22, 1887, to the Common Pleas, and did not extend to the Quarter Sessions. It is true, Mr. Justice GORDON there says, "The proceeding here prescribed (under act of 1864, *supra*) presupposes that the indebtedness has been previously ascertained and fixed, as by judgment, auditor's settlement or otherwise, so that the decree of the court can only be regarded as executionary." If we give the language of the learned judge its full scope and meaning, it will not boot the taxpayers. Here the indebtedness has been fixed and determined by contract between the water company and the borough authorities, previous to the application for the mandamus. The water company comes into court and claims that this indebtedness exists; the borough authorities admit the fact, and it looks to us as if that was equivalent to a judgment.

Why force the water company to sue the borough, when the latter admits the debt and is anxious to discharge it? The presumption is that the borough officers are honest, and that they properly discharge the duties of their places; and that

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this debt is due and owing, because they themselves say so. I am mindful that there are grave charges against their integrity, but we cannot arrest the proceedings here, to determine whether these charges are true or false.

In the absence of a statute giving these taxpayers authority to interfere here, their right must be denied. It is the boast of our law that it affords a remedy for every wrong. If this collusion complained of exists, if the borough be not liable for this debt, the remedy must be sought elsewhere and not in this proceeding. Some forum must be sought where the party seeking aid will be responsible for the costs, if it fails in making good the charges imputed to the borough officials. Desirous as we are to prevent injustice being done, we are powerless to interfere here and embark upon the investigation to which we have been invited by the taxpayers. The petitioners have shown a right to the writ which they seek, and it must be awarded. Nothing remains save to enter a suitable decree.

And now, July 25, 1888, it is ordered, adjudged and decreed that a mandamus be issued directing and commanding chief burgess and members of the town council of the borough of Selin's-Grove, and their successors in office, to levy and collect a special tax of nine (9) mills on the dollar, on the present assessed valuation of taxable property subject to taxation for borough purposes, in the borough of Selin's-Grove, to pay the indebtedness of \$2,044.16, with the interest due by said borough, to the Selin's-Grove Water Company.

Exceptions to the foregoing opinion and decree, filed by petitioners who sought to intervene, were overruled and a bill sealed, whereupon the exceptants took an appeal and a writ of certiorari, specifying that the court erred:

1. In entertaining jurisdiction under the petition of the Selin's-Grove Water Company, the indebtedness claimed not having been ascertained and fixed by judgment, auditors' settlement or other judicial determination.

2. In finding that the admission, by the borough authorities, of the fact of an indebtedness by the borough to the water company, was equivalent to a judgment.

3. In finding that the sum of \$2,044.16 was an indebtedness due by the borough of Selin's-Grove to the Selin's-Grove Water Company.

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4. In refusing to allow Charles Hower, George Schnure and other citizens and taxpayers of the borough of Selin's-Grove, to intervene as parties defendant in the mandamus proceedings.

5. In ordering, adjudging and decreeing that a mandamus should issue, etc.

On the argument at Bar, the appellees filed a motion to quash the appeal and certiorari.

Mr. Charles S. Wolfe (with him *Mr. Andrew A. Leiser*), for the appellants.

Mr. C. P. Ulrich (with him *Mr. A. W. Potter*), for the appellees.

PER CURIAM:

We are of opinion the appellants have no standing to be heard upon their appeal or writ of certiorari. The motion to quash must prevail.

Appeal and certiorari quashed.

C. B. ROHLAND v. LEVI ROOKE.

ERROR TO THE COURT OF COMMON PLEAS OF UNION COUNTY.

Argued May 17, 1889—Decided May 27, 1889.

Where, in a sheriff's interpleader, it was found that the claimant of the property, grain, stock, implements, which had been purchased at execution sales, left it with the execution defendant, who was made a tenant upon a farm rented by the claimant under an arrangement in good faith that the tenant should work the farm, keep up the property, and after taking out a support for himself and family turn over the surplus to the claimant, the transaction was not a fraud in law or in fact upon the tenant's creditors.

Before PAXSON, C. J., GREEN, CLARK, WILLIAMS and MCCOLLUM, JJ.

Charge of Court below.

No. 57 July Term 1889, Sup. Ct.; court below, No. 97 September Term 1888, C. P.

On June 13, 1888, two judgments by confession were entered against J. W. Eyer; one in favor of Thomas Stetler, on a single bill dated December 27, 1877, for \$1,356; the other, in favor of Charles B. Rohland, on a single bill dated January 19, 1888, for \$273.20. On the same day, executions were issued upon said judgments and levies made on certain personal property of the defendant in the judgments. Part of the property levied upon being claimed by Dr. Levi Rooke, a feigned issue was framed and entered to No. 97 September Term 1888, wherein Dr. Rooke, the claimant, was made plaintiff, and Charles B. Rohland and Thomas Stetler, the execution plaintiffs, defendants.

At the trial of the issue on September 18, 1888, evidence was adduced to show that Rooke had bought the articles of property in controversy from one Kreamer, who had bought them at execution sales at which they had been sold as the property of J. W. Eyer; that after Rooke bought the goods he left them in the hands of Eyer, whom he made his tenant upon a farm he had rented, where they were levied upon as the property of Eyer. Eyer testified that the indebtedness represented by the executions upon which the levies were made, existed before Rooke bought the property from Kreamer.

The court, BUCHER, P. J., charged the jury in part as follows:

[If I understand the contention of the plaintiff aright it is this, that having purchased these personal chattels that at the time belonged to Eyer, but which had been sold from him by virtue of a sheriff's sale, he handed them over to him and put him on the farm that he had leased from the Cameron estate, to farm as his agent, the understanding being that he was to take this property and preserve it for the benefit of the doctor, and that he was to have his living expenses out of the farm, pay all the expenses operating the same, the hiring of hands and all that, furnish the seed, and execute that part of the contract, so far as the farming operations were concerned which rested upon Dr. Rooke, and that any surplus that might be

Charge of Court below.

left was to be handed over to him,—that is his contention. And Jonathan Eyer swears substantially to the same thing. The difficulty about the contract between these parties is, that it is not in writing; but it was not necessary in order to make a valid contract that it should be reduced to writing. . . . You are to find out first what it was; you are to ascertain what the contract was between these parties, and thus determine the ownership of these chattels. Then this was followed by testimony on the part of the plaintiff by his witnesses, the main ones being Jonathan W. Eyer and Elias Kreamer. They testify that in April, 1880, Jonathan W. Eyer went into the possession of this farm; that he carried these chattels enumerated in the bill of sale up there and began farming operations, if my memory is not at fault, but you will remember all these things for yourselves. Dr. Rooke did state that Eyer was at liberty to sell any part of this stock as his agent that he might see proper to do, bounded by the limitation that he was to keep it up and maintain it; and if it wore out in the course of nature, or in its use, or any mishap befell it, Eyer was to make it good by supplying him with other property equal to that in value. Was this the contract between the parties?¹ [The learned counsel for the defendants insist that if it was so, the transaction in law amounted to a sale and all the property which Rooke furnished Eyer and any other property that Jonathan W. Eyer purchased and put there in lieu of that which he sold, or was lost and destroyed, was the property of Jonathan W. Eyer and not the property of Dr. Rooke, and was liable to seizure and sale as his property on this execution.]²

[But, gentlemen of the jury, we instruct you that in our opinion such views of the law are erroneous in this particular case. The evidence is, if you believe it, that Rooke put this stock there and that Eyer was to return him that stock or other in lieu of it, as his agent, and if Eyer did take the property of Dr. Rooke, and by that I mean the products of the farm, the money made on the farm which belonged to Rooke, and did apply that to the purchase of other stock for Rooke as his agent, in lieu of that which he sold, or which had died, or was destroyed, that in law it would be the property of Rooke and would not be the property of Jonathan W. Eyer, the defendant in the writ.]³ But if you find from the evidence that any of

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the property found there, other than that which was originally carried there by Eyer, as furnished him by Dr. Rooke from the purchase made by Kreamer, that any of that property found there was purchased by Eyer, with funds other than those that he derived from farming as agent of Rooke, as a matter of course that property would be liable to seizure and sale as the property of Eyer. If Eyer had means, acquired in any other way than from the proceeds of the farm, and appropriated that to the purchase of stock, it would be his own and would be liable to seizure and sale. Now, then, this whole question is a question of fact for you to determine under all the evidence.

As I told you before, the party in possession of personal property is presumed to be the owner. . . . Jonathan W. Eyer testifies, according to my recollection, that the only identical property levied upon on the premises which he took there, as furnished by Dr. Rooke, is one mare, one Oliver chilled plow, a mower, two spring wagons, one fanning-mill, one bob-sled, two wagons, one sleigh and some harness, but he is unable to state how many sets of harness were there. [The other property in dispute you will understand, according to the evidence, was not furnished by Rooke specifically. But his contention is, that it was bought with the proceeds of the farm which belonged to him, and that, therefore, he is the owner of it. Then we have this grain growing in the ground. The contention is, as I said before, that Jonathan Eyer was simply the agent of Rooke and farming for him, and for that reason the ownership in the grain in the ground belongs to Rooke and not to Eyer. The defendants insist that this version of the transaction, as contended for by the plaintiff, is not the fact; that Dr. Rooke actually sold this property to Jonathan W. Eyer, the latter to pay him for it out of the proceeds of the farm, and that the title should remain in Rooke until paid for. If you find from the evidence that such was the fact, as a matter of course all the property except the grain in the ground would be liable to seizure and sale as the property of Jonathan Eyer,]⁴ because, as I told you before, the law dislikes secret liens, and a man cannot sell his property to another and give him the possession and still retain a lien for the price as against creditors. It may be all right and honest between themselves, but as against creditors it would be a fraud in law irrespective of the inten-

Charge of Court below.

tion of the parties. But you must not find that there was such a conditional sale, unless the evidence in the case satisfies you that such was the fact.

* * * * *

You will take the case, gentlemen of the jury, looking at all the circumstances surrounding it in order to determine where the truth lies between these parties. If you find that this transaction was honest and fair, then you would find for the plaintiff. If you find that it was not so, then your verdict should be in favor of the defendants. You have heard the arguments of the respective counsel and further comment is useless from me. I will answer the points and I am done.

Defendants' counsel ask me to say [inter alia]:

2. As to all the property sold by Kreamer to Rooke and left by Rooke with Eyer and by Eyer removed to the Cameron farm, the title to all said property, under the contract or arrangement between Rooke and Eyer as to the same, as detailed by Rooke in his evidence, passed to Eyer, the said contract being in law a sale and not a bailment, and said property is liable to execution as the property of Eyer in this proceeding.

Answer: Refused.⁵

8. A test as to whether title to this property and grain and produce of this farm was in Eyer, under the arrangement with Rooke, or whether there was only a bailment, is this: Did a purchaser from Eyer of any of this property or grain, sold by Eyer as his own, take title thereto? If so, then the title was in Eyer.

Answer: Refused.⁵

The jury returned a verdict for the plaintiff in the issue. A rule for a new trial having been discharged, judgment was entered, when the defendants took this writ, assigning as error:

1-4. The portions of the charge included in []^{1 to 4}

5. The answers to defendants' points.⁵

Mr. Charles S. Wolfe (with him *Messrs. A. C. Simpson & Son* and *Mr. Andrew A. Leiser*), for the plaintiffs in error.

Mr. Andrew H. Dill (with him *Mr. E. M. Beale* and *Mr. Alfred Hayes*), for the defendant in error.

Opinion of the Court.

PER CURIAM:

This was a feigned issue under the sheriff's interpleader act, and involves the title to a quantity of stock, grain and farming implements. If the theory and contention of the plaintiff below be correct, and it has been so found by the jury, he was merely aiding a farmer, broken down financially, to support his family, by placing him upon a farm rented by plaintiff, and supplying him with the necessary stock and agricultural implements to work it. The stock, etc., referred to, had at one time belonged to the debtor in the judgment, but had been sold as his property at a sheriff's sale, and the title thus acquired passed to the plaintiff. Under such circumstances, it was not a fraud in law or in fact to leave them in the possession of the debtor. The plaintiff claimed, and the jury have found, that Eyer was farming the place as the agent of the plaintiff, with the understanding that he was to keep up the stock and farming implements by supplying anything that was lost or worn out, and, after taking out a support for himself and family, hand over any surplus to the plaintiff. This was certainly a humane and generous arrangement, and if done in good faith, as the jury have found, deserves commendation rather than censure. The defendants in the issue have not suffered by it, as their judgment antedated the arrangement; they cannot say they were misled by it, and gave credit to Eyer upon the strength of his possession of the property in question. The case was one for the jury and was submitted to them in a clear and adequate charge.

Judgment affirmed.

Syllabus.

HILL, KEISER & CO. v. S. N. STETLER, ET AL.

ERROR TO THE COURT OF COMMON PLEAS OF LACKAWANNA
COUNTY.

Argued February 23, 1888—Decided April 2, 1888.

Re-argued February 25, 1889—Affirmed May 29, 1889.

[To be reported.]

1. Where the recorded statement of a limited partnership organized under the act of June 2, 1874, P. L. 271, set out that the total amount of capital was \$25,000 "payable in lawful money on the execution hereof," but the association began business with no part of its capital paid in, and opened and kept no subscription list book, its organization was not in compliance with the requirements of the act and the members were liable as general partners.
2. Persons who subscribe but do not contribute, and who by failing to keep a "subscription list book," as required by the act, withhold from the public the means of knowing the amount of capital within reach, are not within the protection of the act, but are liable individually as general partners, including a member subsequently coming in affected with notice of the defective organization.
3. While it is not necessary that the entire capital should be paid in, before a limited partnership may begin business, yet it has no right to begin until some part of its capital subscribed has been actually paid; its statement should show when and in what amounts the subscriptions are to be paid, and the subscription list book required should thereafter show the payment or non-payment of the instalments as they fall due.

Argued before GORDON, C. J., PAXSON, STERRETT, GREEN
and WILLIAMS, JJ.

Re-argued before PAXSON, C. J., STERRETT, GREEN, CLARK,
WILLIAMS, MCCOLLUM and MITCHELL, JJ.

No. 58 January Term 1888, Sup. Ct.; court below, No. 212
October Term 1885, C. P.

On July 8, 1885, Hill, Keiser & Co., Limited, brought assumpsit against S. N. Stetler, E. L. Fuller, R. W. Archbald and Theodore Strong, doing business as The Amity Coal Company, Limited, to recover the sum of \$410.32 with interest, the price and value of furniture sold and delivered by the plaintiffs to the defendants at their request. The defendants pleaded, non-

137	145
138	333
137	145
140	333
127	145
151	85
127	145
195	64

127 145
31 SC '137

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assumpsit, and one of them, Mr. Strong, filed an affidavit of defence denying general partnership and alleging that The Amity Coal Company, Limited, was an association organized under the act of June 2, 1874, P. L. 271, by statement duly recorded.

At the trial on April 4, 1887, the plaintiffs put in evidence the statement of association of S. N. Stetler, E. L. Fuller and R. W. Archbald, dated June 18, 1883, acknowledged June 18, 1883, recorded June 20, 1883. The certificate or statement was drawn in due form, executed by the persons named, and contained the following paragraphs:

"2. The total amount of the capital of the said association is twenty-five thousand dollars (\$25,000), payable in lawful money upon the execution hereof.

"3. The amount of said capital subscribed for by each of the said parties is as follows, to wit: the said Samuel N. Stetler subscribes for eight thousand dollars (\$8,000), the said Edward L. Fuller subscribes for eight thousand dollars (\$8,000), and the said Robert W. Archbald subscribes for nine thousand dollars (\$9,000.)

"4. The business to be conducted by the said association is the owning and leasing of mines and coal lands, and the mining, preparing, shipping, buying, vending, and marketing of anthracite coal, together with all matters incident thereto.

"5. The business of the said association is principally to be conducted in the township of Lackawanna, county of Lackawanna, Pennsylvania.

"6. The name of said association is "The Amity Coal Company, Limited," and the contemplated duration thereof is twenty years."

Then the plaintiffs, under exception noted for the defendants, showed by an examination of Fuller and Stetler, called as on cross-examination, that the defendants had no subscription list book, and neither of the defendants had ever signed any subscription list other than the articles of association; that none of the capital was paid in when the articles were recorded; that not all of the capital was ever paid in; that on November 17, 1883, defendant Strong bought of the company ten shares of stock which had been set aside for Thomas D. Davis, who did not take them, for which ten shares Strong paid \$1,000 into the treasury of the company, and that on Decem-

Statement of Facts.

ber 15, 1883, Strong was elected a member of the company; that when he was elected, Strong inquired whether the stock was paid up or not, and "we informed him we expected or intended to pay all stock whenever it became necessary,—the stock that was unpaid." It was also shown that on November 24, 1884, Strong was elected one of the managers of the company, and paid other sums on his stock. The plaintiffs then proved that the bill of goods for which suit was brought was sold to the defendants between January 3, and February 17, 1885, when all of the defendants were members of the company, and rested.

Thereupon the defendants moved for judgment of nonsuit assigning the following reasons:

1. That the parties sued were associated as The Amity Coal Company, Limited, an organization organized under the act of 1874, by statement duly signed, acknowledged and recorded, as required by the act of assembly, and that such statement has not been shown to be untrue in any particular; and further, that the statement is all that is required by the act of assembly to protect the associates from being sued as general partners.

2. That the claim in suit, according to the testimony of the plaintiff, was not charged to The Amity Coal Company, Limited, but to The Amity Coal Company; and that all the books of the plaintiff in evidence show that fact, that the partnership to whom the goods were charged was not the partnership against which this suit was brought.

3. That if upon the face of the statement as filed and recorded, any inference is to be drawn, the stock subscribed had actually then been paid. That Theodore Strong, who afterwards purchased and had no knowledge to the contrary, was a bona fide purchaser of the stock of this association, and as such should be protected in his purchase, and could not be held as a general partner under any claim of a false statement of which he had no knowledge at the time he purchased his stock. That Theodore Strong, E. L. Fuller, S. N. Stetler, and R. W. Archbald, being all sued as partners forming one partnership under the name of The Amity Coal Company, Limited, if no recovery could be had against Theodore Strong, no recovery could be had in this suit against the other persons named as defendants.

Opinion of Court below.

The court, HAND, P. J., allowed the defendants' motion and entered judgment of nonsuit, with leave to the plaintiffs to move, etc.

The motion having been argued, the court, HAND, P. J., on July 9, 1887, filed the following opinion and order:

Rule to show cause why judgment of compulsory nonsuit shall not be stricken off, 1. As to Theodore Strong one of defendants; 2. As to the other defendants.

The presentation of this case was not made with that care and orderly arrangement of evidence and the law which the court have the right to expect on the part of counsel and which usually characterizes the learned counsel engaged in the case. In the confusion of questions and evidence we are however enabled to state the following which covers all the points raised by the counsel for the plaintiffs, viz.: that the defendants are each and all personally liable as members of a general partnership: 1. Because the certificate which they filed under the act of June 2, 1874, was false, because the capital stock had not been paid in when the certificate was recorded, and 2. Because they kept no subscription list book as provided in the last clause of § 2 of the act.

* * * * *

The sole question for disposition in the case is, whether, as sought by the plaintiffs, a verdict and judgment on the evidence could be entered against these defendants as individuals. No verdict was asked against the association by name, and no amendment was asked to strike out the individual names and proceed against the association, with leave subsequently to ask for execution against individual stockholders as provided by the act. It is a question partly of the construction of the act on the merits of this controversy, and partly of practice.

In regard to the merits the whole controversy turns upon whether the statement filed of record was a false statement. The alleged falsity of the statement turns wholly upon the construction to be placed on the words in clause 2 of the statement relating to the capital, viz.: "payable in lawful money upon the execution hereof." It is alleged that with this clause in the statement, the actual non-payment of the capital at the time it was recorded, made the statement false, and the whole

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proceeding or attempt under the act of 1874 a nullity so far as that act is concerned, and constituted the joint stock company, ever after that, a general partnership. On the other hand, it is asserted that there is no false statement; that the true and natural meaning of the words in law is, that the language fixed a time when the capital was due, and payment could be enforced both as among the subscribers and with creditors.

Before we proceed to a consideration of the act itself, which is involved in the range the argument has taken, we first construe the clause in question. It will be observed that section 2 states that "the total amount of the capital of said association is \$25,000, payable in lawful money upon the execution hereof." In section 3 each member "subscribes for eight thousand" (or his amount) "dollars," and the evidence shows the statement filed is the subscription. The act does not require a payment at the time of subscribing; it requires a "subscribing and contributing" capital at some time. It leaves the matter of "when and how" the capital shall be "paid" to be fixed in the statement filed. It makes provision for the collecting of unpaid subscriptions on the basis of the integrity of the organization, as an organization, in § 2 of the act. Such being the case, we apprehend that no other construction is to be put upon the words "payable on the execution hereof," than would be put upon the same words in articles of agreement, or a mortgage, or deed. It was never understood in an agreement or deed that "payable on the execution hereof" signified that the amount was actually paid by such execution, or was an acquittance to the vendee or grantee of such payment. It has no other significance than that the sum is "to be paid" on that event or day, and is no evidence of a fact accomplished. The statute requires that it shall be stated when the capital is "to be paid," nor does the word "payable" stand in any sense equivalent to "paid." Its legal meaning is that the amount becomes thereby due and its payment can be enforced.

We can see no falsehood practiced on any person by the recording of the certificate without the payment of the money. Ordinarily the execution of an instrument of writing signifies the whole act by which the instrument becomes of force, its signature and delivery, or if a recording is essential to its existence and validity, also its being recorded. Be this as it may,

Opinion of Court below.

in this case the act of assembly does not contemplate that the statement filed is evidence of when or how much of the capital stock is actually paid. That must be ascertained by the book or books kept by the association which are required for that purpose. One of the reasons, undoubtedly, why the law did not require the subscriptions to be paid up, in order to make the association valid, was that the capital might not be needed at once. No wrong would thereby be done to creditors, because they could ascertain how much was paid. In the case at bar, payment by Strong was made before the plaintiffs sold any goods to the association, and before, so far as this case appears, any business was transacted.

It may be assumed without question that when all the requisites of the act of 1874 are complied with, and the statement contains truthfully those requisites, that a joint stock company with limited liability is formed, and that general liability is not incurred except under the provisions of the statute. This the statute expressly provides for. These requisites are, (1) that three or more persons shall sign and acknowledge duly a statement in writing; (2) which shall set forth the full names of such persons; (3) the amount of capital of such association subscribed for by each; (4) the total amount of capital and when and how to be paid; (5) the character of the business to be conducted, and the location of the same; (6) the name of the association with the word "limited" added thereto, as part of the same; (7) the contemplated duration of said association, which shall not exceed in any case twenty years; (8) the names of the officers selected in conformity with the provisions of the act. All these requisites are literally and strictly fulfilled in this charter. The statement is duly signed and acknowledged by three persons, their full names are set out, the amount of the capital is \$25,000. Stetler subscribes for \$8,000, Fuller, \$8,000, and Archbald, \$9,000. The capital is payable on the execution thereof, the business is clearly stated, the name is The Amity Coal Company, Limited, its business is to be conducted in the township of Lackawanna, in the county of Lackawanna, Pennsylvania, its duration is twenty years, and its officers are the three persons who form the association.

Most of the argument in this case has been drawn from the decisions which relate to special partnerships, in which some

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of the partners are general and one or more are simply special. The associations organized under the act of 1874 are an entirely distinct class of organized bodies. This is stated in the elementary works on partnership, and the decisions of our own courts. A limited liability is attempted to be secured to all the members and it is secured by fair, explicit and strict provisions, and in a way which when complied with not only protects the members, but protects all creditors who choose to avail themselves of the knowledge which the law and the books of the association give them of such associations. When the members are within the protection of the act, then it should be held as a shield to them, and creditors and members should be required to conform to the act in seeking these remedies at law. We have seen that this organization in its inception did comply with the act of assembly. The plaintiff, however, in commencing this action assumed, on the mere fact of non-payment of their subscriptions by Stetler, Fuller and Archbald, at the time stipulated and before the statement was recorded, that the whole organization was absolutely void as a limited liability association, both as regards themselves and Strong, who came in subsequently. The act itself pointed out clearly and equitably to all parties concerned, their mode of procedure for non-payment of the capital stock or subscription. They could have sued the association, recovered their verdict and judgment, and then on motion and a rule in case they failed against the association, they could have had their execution against the individuals for the non-payment of subscriptions or any part remaining unpaid. Their whole assumption, in this part of their case, rests on the false foundation that the mere non-payment of the subscription at the time stipulated, avoided the association and made a general partnership. This false foundation giving way, their whole superstructure falls with it. It is true that an attempt to form such a joint stock company, or a corporation, which contains a fatal defect, would avoid all proceedings under it and make the stockholders or members general partners; it is also true that when a special or limited liability is set up as a defence, that the statute must be strictly followed which creates the limited liability; but when virtue is once given to an organization under the statute, and its integrity is untainted by technical or formal defects,

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then the limited liability is secured and remains, unless it is lost by a subsequent violation contemplated by the law itself. This general doctrine of special partnerships is clearly and emphatically laid down as a part of this act of 1874, and we shall discover by an examination of the cases that so far as this act has come under construction by our higher court, the remedies have been pursued under the act of 1874, in every case where there was a substantial compliance in the organization.

This plaintiff sues the individual partners in the first instance. Section 2 of the act, expressly provides that "the members shall not be liable under any judgment, decree or order which shall be obtained against such association, or for any debt or engagement of such company, further or otherwise than is hereinafter provided." What is further or otherwise provided? 1. The collection of the unpaid subscriptions, to the extent of the portions respectively not paid up, and provision is made for the execution. And in order that the extent of the unpaid subscriptions may be ascertained, the court has full power to compel the production of books. And a "subscription list book" is required to be kept, of which we shall have something further to say. 2. The omission of the word "limited" makes each member participant in such omission liable personally. Section 3, act of May 1, 1876, P. L. 89, which is supplementary to the original act, and now part of it, provides that such association shall be sued in its association name.

It will therefore be discovered that it is a logical legal conclusion that for the remedy here sought, viz.: the payment of a debt by an individual member because of the non-payment of his subscription, the act gives a full and complete remedy by suit against the association and then by execution, first, against it, and (if not successful) then by execution against the individual for so much of his subscription as is unpaid. No action can be maintained against the stockholders in the first instance, one or all; it not only is not provided for, but it thoroughly ousts the legal remedy provided. It also conflicts with the equity of that legal remedy, because the members may have paid in in unequal proportions. In the present action the evidence shows a full payment of stock by Strong, a large payment by Stetler, and possibly up to a certain date,

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none by the two others. A verdict and judgment in this action would be against Strong for the whole debt as well as against Stetler. It is perhaps to be regretted that the plaintiff did not ask to amend and save time by taking judgment against the association, but that is not now before us.

We state the general propositions of law which seem to us to govern in associations of this kind. Where there is a totally defective organization never instinct with life under the statute, the members may be sued in the first instance as a general partnership. When the association is once legally created, the remedies must be pursued as provided by the statute, when for non-payment of subscription, first against the association and then against the individual stockholders in default.

In regard to the claim made that there was no "subscription list book" kept, if this be true, which the plaintiffs have not shown, the act does not make the absence of that a cause of individual liability. The purpose ("for that purpose") for which that book is to be kept is to aid the court to ascertain the truth in regard to the unpaid subscriptions. It was assumed on the argument by counsel that that book meant an original subscription by sign manual; the term does not so signify. From the evidence, Fuller testified that they considered their original subscription in connection with the stock ledger, which he said "showed the transaction," made a subscription list book. From it he gave the whole data of subscribers' stock and payments. The book was not formally put in evidence and we have its character only from Fuller's testimony. We do not say that a separate book, perhaps made out by the secretary, and styled technically "a subscription list book," would not be the best mode of meeting this requirement, but the plaintiff has not clearly shown that this provision was not substantially complied with. Even if the other members were deficient in this respect, Strong is in no way chargeable with such neglect.

* * * * *

In the case at bar every requisite of the act is complied with; the sole delinquency, which is a fact outside of the statement filed, and one contemplated by the act of assembly, is expressly provided for by the act of assembly. So far as this plaintiff is concerned, he has suffered no injury which is

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not expressly provided for under the act; he shows no inquiry nor state of facts, which upon inquiry would not have furnished the exact information, as the evidence discloses, contemplated by the act, and upon which he has his legal remedy, as well by pursuing the remedy provided by the act as by a suit against defendants as general partners.

We have deemed it important to enter upon the question of practice in this case, because the act of assembly is new in our commonwealth, and when properly understood one of great benefit both to members and creditors and the public at large. The act is taken mainly from English statutes on the same subject, and the decisions in the English courts, so far as we have been able to examine them, clearly point out the mode of practice and the remedies, as we have stated in the foregoing opinion and as are foreshadowed in the few cases which have arisen in this country. The law relating to this class of associations is distinctive, as already intimated, and they are classified as joint stock companies, both in English and American digests and opinions.

We are satisfied upon the evidence in this case that the proper remedy is first against the association by name, and then, on proper evidence, by application to the court against the individuals, for execution of the judgment after failure to recover from the association. If this is correct, no verdict could have been taken against any of the individual members, and the nonsuit was properly entered.

The rule to take off nonsuit as to Theodore Strong is discharged. Also the rule as to the other defendants, Stetler, Archbald and Fuller is discharged. Exceptions.

Thereupon the plaintiffs took this writ, assigning for error: 1. The order entering the judgment of nonsuit; and 2, the order discharging the rule to show cause why the judgment of nonsuit should not be vacated.

Mr. Everett Warren and *Mr. Frederick W. Gunster* (with them *Mr. Edward N. Willard*), for the plaintiffs in error:

1. The act of June 2, 1874, P. L. 271, requires that in the statement signed and acknowledged shall be set forth, *inter alia*, "the amount of capital of said association subscribed for

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by each," and "the character of the business to be conducted and the location of the same." The subscription is an act necessary to raise the capital, and the statement is a declaration to the world that the preliminary act has been performed, and that the capital, whether in cash or otherwise, has been subscribed for. None of the \$25,000 capital had been subscribed for, and starting, as the defendants did, without any subscription, they gave their association a name but no location. The statement was false, because in their preliminary arrangements, \$1,000 of the contemplated capital had been allotted to a Mr. Davis; Mr. Davis had not subscribed for it, and did not even sign the articles or statement, which is now treated as the subscription list; and not a dollar of the capital was paid in at the time of the execution of the statement, nor until the purchase of the stock by Mr. Strong.

2. With due submission to the court below, we submit that the question is not what the act in question makes a cause of individual liability; but, have the defendants done what the law required them to do, in order that they might not be individually liable. The act says they shall keep a subscription list book. The court below held that they need not. But, as Mr. Justice PAXSON said in *Maloney v. Bruce*, 94 Pa. 252, "If parties seek to have all the advantages of a partnership, and yet limit their liability as to creditors, they must comply strictly with the act." This principle applies to limited partnerships under the act of 1836 and its supplements: *Andrews v. Schott*, 10 Pa. 47; *Richardson v. Hogg*, 38 Pa. 153; *Vandike v. Rosskam*, 67 Pa. 330; *Guillou v. Peterson*, 89 Pa. 163; *Metropolitan N. Bank v. Gruber*, 14 W. N. 12; *Conrow v. Gravenstine*, 17 W. N. 204; and equally to limited partnerships under the act of 1874 and its supplements: *Maloney v. Bruce*, 94 Pa. 252; *Bement v. Brick Machine Co.*, 5 W. N. 58; *Keystone Boot & Shoe Co. v. Schoellkopf's Sons*, 11 W. N. 132; *Pears v. Barnes*, 1 Cent. R. 569; *Eliot v. Himrod*, 108 Pa. 569; *Hite N. Gas Co.'s App.*, 118 Pa. 436.

3. Recording the articles of association was a declaration to the world that the capital had been paid in in cash. Parties dealing with defendants had a right to conclude it was paid. When Fuller, Stetler and Archbald filed their articles, they further stated to the commercial world that they had each sub-

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scribed for so many shares of the Amity Coal Company, when as a matter of fact they had not then subscribed for a cent, and never afterward subscribed for a single share; neither they, nor Theodore Strong, who afterwards entered the concern. They invited credit on a capital of \$25,000, when in fact they had no capital at all, and thus became guilty of a fraud of the grossest kind: *Haviland v. Chase*, 39 Barb. 285; *Eliot v. Himrod*, 108 Pa. 569; *Pears v. Barnes*, 1 Cent. R. 569; *Richardson v. Hogg*, 38 Pa. 153.

Mr. W. H. Jessup (with him *Mr. E. B. Sturges*), for the defendants in error:

The principal objection to the statement is that it is false. We admit that if it is false in any essential particular, it will afford no protection. But wherein is the falsity alleged? It seems too plain for argument that an obligation "payable upon the execution hereof," is one making the debt due immediately after the same is delivered. In the articles, the clause means simply that the amount is presently due from the subscriber after he has affixed his name thereto. Was there any capital subscribed for? Each of the three persons associating certifies for himself and the others to a present subscription for the full amount of the capital. This statement, when filed, made a valid legal organization, and for all debts contracted by the organization, it alone could be sued. And under § 2 of the act, the only remedy was by suit against the association, and after judgment and execution returned *nulla bona*, then by rule on the defaulting stockholder to show cause why execution should not issue against him for the amount unpaid upon his subscription: *Lauder v. Tillia*, 117 Pa. 305.

OPINION, MR. JUSTICE WILLIAMS:

The defendants are sued as partners. They claim the immunity from liability as individuals which the act of 1874 confers on persons associating themselves in a joint stock or limited partnership association, alleging that they have fully complied with its provisions. This is the question on which the plaintiffs' right to recover depends. The court below held that the organization of the Amity Coal Company, Limited, had been in full compliance with the provisions of the statute, and that

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the only remedy of the plaintiffs was by action against the association and then against the stockholders severally for the amount unpaid upon their stock subscriptions. A compulsory nonsuit was accordingly entered against the plaintiffs which the court declined to take off, and this action of the court is the error assigned.

The act of 1874 provides that when persons "desire to form a partnership association for the purpose of conducting any lawful business by subscribing and contributing capital thereto, which capital shall alone be liable for the debts of such association," they shall make and subscribe to a statement in writing, in which they shall set forth among other things the full names of the persons so associating themselves together; "the amount of capital stock of said association subscribed by each; the total amount of capital and when and how to be paid." In § 2 it is provided that the members of the association shall not be individually liable for any debt of the association until the joint property has first been exhausted, and then only to the extent to which they may be indebted upon their subscriptions to the capital stock. To the end that the subscribers may be protected and their liability kept within the prescribed limits, no execution can issue against them until an order has been made by the court in which the judgment is entered, or a law judge thereof, on notice to the person to be affected, and after full hearing, fixing the amount due upon his subscription and awarding the writ. In order that this question may be disposed of correctly, the act requires every such association to keep a "subscription list book" that may be produced in court, and that shall be "open to inspection by the creditors and members of the association at all reasonable times."

The Amity Coal Company, Limited, was organized by three persons, viz.: Stetler, Fuller, and Archbald, who subscribed and acknowledged the statement in due form. This statement set out the following facts for the information of the public: "The amount of the capital stock of said association is twenty-five thousand dollars payable in lawful money on the execution hereof." The persons subscribing to the stock and the amount subscribed by each was stated as follows: "The said Samuel N. Stetler subscribes for eight thousand dollars, said Edward

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L. Fuller subscribes for eight thousand dollars, and the said Robert W. Archbald subscribes for nine thousand dollars." The business to be done by the association is stated to be "the owning and leasing of mines and coal lands, and the mining, preparing, shipping, buying, and marketing of anthracite coal, together with all matters incident thereto." This statement followed the act of assembly, and as to its form was entirely regular, but the proofs show that not one dollar was paid by either of the subscribers to the stock. It was nevertheless recorded, and the Amity Coal Company, Limited, entered upon its business career without a farthing in its treasury or an article of property in the world. This was not a compliance in good faith with the requirements of the act of 1874. The purpose of that act was to foster legitimate and honest undertakings where capital was "subscribed and contributed" by persons desiring to engage in business, and not to bring into life a brood of associations without capital, without a treasury, and possibly without a solvent subscriber. But this association was not merely an empty shell, for its statement was misleading and deceptive. It provided for a capital of \$25,000, which was made payable on the execution of the statement. It was subscribed and acknowledged and then regularly recorded, without the payment of a dollar of the subscribed capital. The only source of information, besides the statement which the law provides for, is the "subscription list book" which all such associations are required to keep, but which this one never opened. The fair import of the language of the statement that the subscribed capital was payable "on the execution hereof," is that it was to be paid down; and the subsequent recording of the statement is an assertion that the subscribers have performed their promise and paid their subscriptions into the treasury. To enter upon business with the credit which the possession of a paid-up capital of \$25,000 would give the association, when in fact nothing had been paid, either in money or property, was an evasion of the law and a fraud upon the public.

In saying this we do not impute an intention to defraud, or reflect upon the motives of the gentlemen by whom the Amity Coal Company was organized. They may have supposed themselves to be complying with the provisions of the act. Our

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business is not with their motives, but with what they did; and our inquiry is whether this association was organized in accordance with the fair interpretation of the act of 1874. The act provides for the protection from personal liability of those who "subscribe and contribute" a capital to be employed in any lawful business. The "capital" is staked upon the success of the business, but because the amount of the capital appears upon the statement on record and the "subscription list book" on the desk of the association, all who have occasion to deal with it may know the amount of actual capital within reach, and determine to what extent the association is entitled to credit. But persons who subscribe yet never contribute, and who, by failing to keep a "subscription list book," withhold from the public all means of knowing the truth, cannot be within the protection of the act. They really put nothing into the enterprise except the credit of a capital that is actually withheld. They mislead the public and induce confidence to which they are not entitled. In other words, the credit they obtain rests not upon a subscribed and contributed capital, but upon a fraudulent appearance of such capital in their statement.

We do not hold it necessary to a valid organization that the entire subscribed capital should be paid into the treasury before an association can begin business. The act of 1874 contemplates the possibility of unpaid balances and provides a method by which creditors may reach them; but we do hold that an association has no right to enter upon business until some part of the subscribed capital has been actually paid. The statement should show when and in what amounts the subscriptions are to be paid, and the subscription list book should thereafter show the payment or the failure to pay the instalments falling due after the recording of the statement, so that members and creditors may see at any time the exact situation of the association. These are the terms upon which the statute promises individual immunity from the debts of the concern, and they must be complied with fairly and honestly. Where persons seek the benefits of an act of assembly they must take them upon the terms which the act prescribes, or not at all. In *Malony v. Bruce*, 94 Pa. 252, PAXSON, J., said: "If parties seek to have all the advantages of a partnership and

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yet limit their liability as to creditors, they must comply strictly with the act."

Under the limited partnership act of 1836, the same rule was repeatedly held: *Richardson v. Hogg*, 38 Pa. 153; *Guillou v. Peterson*, 89 Pa. 163. The recent case of the Appeal of the Hite Natural Gas Co., Limited, 118 Pa. 436, is very nearly in point. In the recorded statement, Hite's subscription for \$80,000 of the capital stock was stated to be paid by the transfer to the company of the right of way for the pipe line, etc., when in fact the right of way had not been procured. This was a false statement as to a material fact affecting the capital of the company, and it was held that it rendered the subscribers liable to creditors as partners.

But it is urged that Mr. Strong, who was not a subscriber to the stock, paid fully and fairly for the interest which he subsequently bought in the association, and that he ought not to be held liable for the misrepresentations of the original subscribers. The organization took place on June 18, 1883. On the 17th of November following, Mr. Strong purchased ten shares and paid one thousand dollars, their par value, into the treasury. He did not purchase from one of the subscribers who held the entire stock, and pay to him for his shares, but he paid to the treasurer. He had notice therefore that the stock then issued to him had never been paid for. If he had made inquiry, as he was bound to do, into the manner in which the association had been organized, and whether the act of 1874 had been complied with in good faith, he would have learned the facts; and he is chargeable with notice of all that such an inquiry would have disclosed. He then had notice in law, if not in fact, that not one dollar had ever been paid by the subscribers, either at the execution of the statement or at any intermediate date, and that the association was without money or property with which to conduct business or pay its liabilities. With this notice he purchased an interest in the association and subsequently became one of its managers.

It is not easy to see upon what principle he can be said to stand on better ground than his associates. He bought into an association organized in disregard of the act of 1874, doing business without a capital and as a matter of speculative adventure. It was an empty shell, a sham; and Mr. Strong's

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position is the same as if he had bought into any other insolvent firm. He did not become liable for debts contracted before he became a member, but for debts contracted afterwards, he and his associates are liable as partners. Mr. Strong's honest payment for his interest cannot cure the vice which infected this association from its organization, or relieve him from the legal consequences of his connection with an insolvent firm.

Judgment reversed, and *venire facias de novo* awarded.

On May 14, 1888, a re-argument of the foregoing cause was ordered on motion of the defendants.

Mr. Everett Warren and *Mr. J. Vaughan Darling* (with them *Mr. Edward N. Willard* and *Mr. Charles H. Welles*), for the plaintiffs in error.

Mr. W. H. Jessup and *Mr. John G. Johnson* (with them *Mr. E. B. Sturgess* and *Mr. William Strong*), for the defendants in error.

OPINION, MR. JUSTICE WILLIAMS :

The persons composing a partnership may agree with each other to invest a certain fixed sum each in the common venture, and no more. Such an agreement may limit the interest of each in the property and profits of the firm, but it will not limit the liability of any for the firm debts. Each member will be liable individually for the entire indebtedness of the firm. The act of 1874 was passed to relieve against the risk and inconvenience attending general partnerships, by providing a mode by which individuals might invest a fixed sum in a business enterprise, without liability to loss beyond the sum so invested. The method provided is the creation of a new artificial person to be called a joint stock association, having some of the characteristics of a partnership and some of a corporation.

The process by which this new organization is brought into business existence is plainly laid down in the statute. Three or more persons may agree to form such an association. They must put their agreement in writing, in the form not of a contract with each other, but of a certificate for the information of the public. This must be signed by every member of the asso-

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ciation, and, as a further assurance of its truth, it must be acknowledged by them. It must set out, among other things, the names of the persons uniting in the enterprise, and the name by which the new artificial person is to be known; the total capital subscribed and the amount subscribed by each member, and a statement showing when and how it is to be paid. When the certificate has been prepared, signed and acknowledged, and when the payment of capital into the treasury has been made in accordance with its terms, the preliminary work of organization is completed, and the association is ready to be called into life by the organic act, the recording of the certificate. This gives it existence and a name in the business world. Thenceforward the promoters cease to act as individuals or as partners in the common business, but through and in the name and upon the credit of the joint stock association. When the association enters upon its business life, it should have in its treasury the capital, or so much thereof as the recorded certificate endows it with at the outset; and the balance remaining unpaid, in accordance with the terms of the certificate, should appear upon the stock subscription book provided for by the act, so that a creditor or any one interested to know could determine whether and to what extent the new business agency was entitled to credit.

In the case of business corporations, the certificate that at least ten per cent of the subscribed capital has been paid in goes to the governor, and he then issues letters-patent, which impart life to the corporation. In the case of joint stock associations, the members are trusted by the law to certify directly to the public without the intervening agency of the governor, and thus to give life to their own creature. Under such circumstances the courts should require absolute good faith and an honest compliance with the law from those who claim exemption from individual liability as members of a joint stock association. If no capital has been put into the concern, no actual cash with which to begin business, it has no right to begin business. The subscribers have no right to record the certificate, and to do so is a fraud upon the law and a fraud upon the public. We do not say that the entire capital must be paid down. The law does not say so, but seems to contemplate a payment by instalments. What we do say is, that un-

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til some part of the capital has been paid in conformity with the certificate, the recording of the certificate is not authorized by the law, and can give no business life to the limp and empty framework of the association. In analogy to the business corporations of the state, ten per cent of the subscribed capital would seem to be the minimum amount to be actually provided for and paid into the treasury before the recording of the certificate, which, as we have already said, should show the times of subscription truly, and should be complied with fully and honestly before it goes upon the record.

This was substantially said when this case was before us one year ago. A fresh examination of the subject, aided by an elaborate re-argument, has not persuaded us that we were in error in the views then expressed.

Turning now to the facts of this case, they seem to leave us no alternative under the salutary rule laid down. This certificate when prepared put the capital stock at twenty-five thousand dollars. It gave the names of the subscribers and the amount of stock subscribed by each. In obedience to the statutory requirement to state when and how the subscribed stock was to be paid, it stated, "to be paid on the execution hereof." Now the first thing to be done was to execute the certificate. After that was done, it was to be acknowledged as an assurance of its truth; then it was to be recorded as the certificate of those signing it, made to the public, that its provisions had been complied with. The recording of the certificate was therefore a distinct affirmance that the capital to be paid on its execution had been paid, and that the association was entitled to the credit which its capital should command. The fact was, however, that neither of the stockholders paid one cent on the execution of the certificate, nor at its acknowledgment, nor when it was recorded, nor yet when they began business in the name of the association.

It is useless to argue that such conduct is a compliance with the requirements of the act. It is a palpable disregard of the act of 1874, and of the requirements of business honesty.

We speak of the facts as they appear upon this record. The case goes back for a new trial. If upon such trial, with attention directed to this point, a different showing is made and the facts necessary to a legal organization are made to appear,

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the case may be taken out from the operation of the rule ; but, on the facts before us, we hold that the subscribers to the stock in this association, by reason of their disregard of the law under which they attempted to organize, acquired no rights under it, but became liable as general partners for all the debts contracted in the name of the association. Nor do we see our way clear to relieve one who bought an interest in the concern months afterward and honestly put his money into its business. Like one buying into an ordinary mercantile partnership, he was bound to inquire into the organization and condition of the concern in which he was about to invest his money.

The order heretofore made reversing the judgment of the court below remains in full force.

Mr. Chief Justice PAXSON and Mr. Justice MITCHELL dissent.

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ERIE BOOT & SHOE CO. v. J. A. EICHENLAUB.

ERROR TO THE COURT OF COMMON PLEAS OF ERIE COUNTY.

Argued April 30, 1889—Decided May 29, 1889.

(a) In an action by an accommodation indorser against the maker, to recover the amount paid by plaintiff to lift a note from bank, an affidavit of defence averred that the note was made fraudulently, was without consideration, and that the plaintiff had knowledge of these facts when his indorsement was made.

1. In such case, the plaintiff was not entitled to summary judgment under the procedure act of May 25, 1887, P. L. 271, because (1) his statement of claim did not aver that the bank was a bona fide holder of the note for value, and (2), even with such an averment, the protection afforded would not extend to a party to the original fraud.

Before PAXSON, C. J., STERRETT, WILLIAMS, MCCOLLUM and MITCHELL, JJ.

No. 45 January Term 1889, Sup. Ct. ; court below, No. 24 September Term 1888, C. P.

Statement of Facts.

On May 24, 1888, J. A. Eichenlaub brought assumpsit against the Erie Boot & Shoe Co., filing the following statement of claim:

J. Adam Eichenlaub brings this suit to recover from the Erie Boot & Shoe Company, a corporation incorporated under the laws of the state of Pennsylvania, the sum of \$10,270.13, the amount due upon a certain promissory note made by the defendant as follows:

"\$10,000.

ERIE, PA., Nov. 5, 1887.

Sixty days after date we promise to pay to the order of the estate of Joseph Eichenlaub, deceased, ten thousand dollars, at the Second National Bank of Erie, Pa., without defalcation or stay of execution, for value received.

ERIE BOOT & SHOE Co.,

Joseph P. Eichenlaub, Pres't."

[Endorsed]

"Joseph P. Eichenlaub, executor of estate of Joseph Eichenlaub, deceased."

"J. A. Eichenlaub."

That when said note became due, on January 7, 1888, the said defendant did not pay the same, ... and the plaintiff was compelled and did pay to the Second National Bank of Erie, the owner and holder of said note, the said sum of \$10,270.13 to take the same up; he, the said plaintiff, being the last indorser on said note, and was an accommodation indorser for said defendant on said note at its request.

Therefore the said J. A. Eichenlaub avers, etc.

The affidavit of defence, in its material averments was as follows:

"Personally appeared before me, the undersigned, Thomas H. Cole, who being duly sworn, says that he is one of the stockholders of the said defendant company. . . . The said note upon which suit is brought was made, or caused to be made, by Joseph P. Eichenlaub, without any knowledge or authority from the officers and directors of the said company, and without any consideration to support it; the said note was and is made to no person, purporting to be made to the estate of Joseph Eichenlaub, deceased, to whom the defendant company was in no wise indebted, in any manner, to the best of

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the deponent's information; and deponent doth further say that the pretended and unauthorized note or instrument contains in it a large amount of usurious interest, at the rate of seven, eight and nine per cent interest, running eight or nine, or more years, on a running account between Joseph Eichenlaub and the defendant company, amounting to some \$1,147.90; and deponent further says that the said estate of Joseph Eichenlaub was at the time said note was made, and now is indebted to the defendant corporation for leather, thread, boots, shoes and merchandise, purchased from said defendant, running from 1879 until his death in 1886, amounting to \$11,281.88 or more."

[Statement of account here given.]

A supplemental affidavit of defence, made by Thomas H. Cole, averred:

"That he is the manager of the business of the said company; that this deponent is informed and believes and expects to be able to prove, on the trial of this case, that the note upon which this suit is brought was fraudulently made and issued by Joseph P. Eichenlaub to the estate of Joseph Eichenlaub, of which estate the said Joseph P. Eichenlaub was one of the executors, without any consideration whatsoever; that at the time of the making of said note the said defendant was not indebted to the estate of Joseph Eichenlaub, deceased, in any sum whatsoever; but on the contrary the said estate of Joseph Eichenlaub was indebted to the said defendant more than eleven thousand dollars, and both the said Joseph P. Eichenlaub and the said J. A. Eichenlaub well knew these facts. This deponent charges upon information and belief, and expects to be able to prove the same on the trial of this case, that the said note was made in pursuance of an arrangement between the said Joseph P. Eichenlaub and the said J. A. Eichenlaub for the purpose of borrowing a large amount of money with which to pay a debt owing by Joseph Eichenlaub, deceased, to the receiver of the German Insurance Company, of Erie, Pa., and that the said J. A. Eichenlaub well knew at and before the making of the said note that the said defendant was not indebted to the estate of said Joseph Eichenlaub, deceased; and that the said J. A. Eichenlaub is not a bona fide holder of said note, but is an accommodation endorser with full knowledge of all said facts before he endorsed said note, and before he procured possession of the same."

Opinion of the Court.

A rule for judgment for want of a sufficient affidavit of defence having been argued, the court, GUNNISON, P. J., on September 17, 1888, filed the following opinion and order:

The facts alleged in the affidavit of defence would be a sufficient defence in a suit by the payee against the maker of the note. They would also constitute a sufficient defence in this suit, if there had been no intermediate bona fide holders of the note before maturity and for value. It is not alleged that the Second National Bank was not such a holder. The plaintiff became the holder of the note by reason of his payment of it to the Second National Bank. The bank was his immediate assignor. "The assignee takes the instrument subject to all the objections and equities to which it was subject in the hands of the person from whom he takes it:" *Wain v. Haldeman*, 2 Pears. 26. No facts are set out which could constitute a defence against recovery on the note at the suit of the bank. Nor could the plaintiff, who was an accommodation indorser, have resisted payment at the suit of the bank against him upon his indorsement. He was compelled to pay the bank. The want of consideration and the fraud in the original transaction, alleged by the defendant, could not have availed him as indorser, or the defendant as maker, as against the bank. Having been compelled to pay, he succeeded to the right of the bank and was affected by such equities as it was affected by, and by none other.

The rule to show cause is made absolute.

Judgment having been entered in favor of the plaintiff for \$10,148.42, the defendant took this writ, assigning as error the order of the court making the rule for judgment absolute.

Mr. William Benson, for the plaintiff in error.

Mr. F. F. Marshall, for the defendant in error.

OPINION, MR. JUSTICE MITCHELL:

This action was brought upon a promissory note made in the name of the company plaintiff in error by Joseph P. Eichenlaub, its president, in favor of the estate of Joseph Eichenlaub, deceased, of which he was himself the executor. It was

Opinion of the Court.

therefore a note in the name of a principal, but made by an agent in his own favor. The affidavit of defence avers that the note was made fraudulently, without the knowledge or authority of the company, and without consideration, and that the plaintiff below had knowledge of these facts before he took the note. The court below, conceding that this established a *prima facie* defence against the payee, nevertheless held the affidavit insufficient in the present action because the plaintiff had become the holder through his payment of the note to the bank. But this view of the case overlooks two important points in defendant's favor.

First; it nowhere appears that the bank was a bona fide holder for value before maturity. In fact it is only stated collaterally and argumentatively that the bank was a holder of the note at all; all that appears on the subject anywhere in the record being that part of the plaintiff's statement which says that the defendant "has never paid the said note or any part thereof, and the plaintiff was compelled and did pay to the Second National Bank, the owner and holder of said note, the sum of ten thousand dollars," etc. Where the affidavit avers that a note was made or put in circulation fraudulently, it must appear that the holder has such a title as bars all the equities between the original parties. Under the former affidavit of defence law, such an affidavit was sufficient to prevent judgment: *Smith v. L. & B. Ass'n*, 93 Pa. 19. How far, under the procedure act of 1887, the plaintiff's statement may supply the proof of title previously required to be made to a jury, it is not necessary now to consider, as it is entirely clear that nothing short of a specific and positive averment of the whole facts in plaintiff's title, can have that effect, and there is no such averment here. For all that appears, the bank may have been a mere depository of the note for the purpose of collection. On this branch alone the affidavit was sufficient.

But secondly; even if the bank was a bona fide holder, judgment could not be entered in favor of the plaintiff, in the face of the supplemental affidavit that he knew of and was a party to the fraudulent arrangement by which the note was made. The bona fide title of a holder protects all subsequent holders, as a general rule, but this protection does not extend to a party to the original fraud.

Syllabus.

The affidavits therefore set up facts which if true are a good defence against the present plaintiff. The counter statement of the defendant in error gives an entirely different version of the transaction, and states several facts that would do away entirely with the defence set up, but being no part of the record these allegations cannot be considered here. The point against the affidavit that it is made by a mere stockholder without setting out any special knowledge of the facts, or any reason why it is not made by an officer or director, is well taken, but its effect is obviated by the averment in the supplemental affidavit that the affiant is the manager of the business of the company.

Upon the case as it stands, the defendant was entitled to go to a jury.

Judgment reversed and procedendo awarded.

CITY OF ERIE, FOR USE, v. JOHN C. BRADY.

ERROR TO THE COURT OF COMMON PLEAS OF ERIE COUNTY.

Argued April 30, 1889—Decided May 29, 1889.

1. A municipal ordinance providing for the paving and curbing of a city street, enacted subsequently to the act of May 1, 1876, P. L. 94, is null and void, if before its passage the councils have not caused an estimate to be made of the total cost of such improvement, maps, etc., thereof, and had the same attached to the ordinance, as required by said act.
2. When such an estimate has not been previously made and attached to the ordinance at its passage, the defect is not cured by the provisions of § 2, act of May 17, 1887, P. L. 118, that "all taxes heretofore levied in any cities of the third, fourth and fifth classes, . . . and all assessments, made in pursuance of the ordinances of such cities, are hereby made valid."
3. When it appeared that in fact the provisions of the act of 1876 were formally complied with by the city engineer, but that the estimate made was not such as the defendant considered sufficient, the proper method to state the defence was to set out a copy of the estimate with an averment of the defects in it.*

*See Erie City v. Butler, 120 Pa. 374.

127	169
169	374
127	169
176	482
127	169
192	3

Statement of Facts.

4. If, however, the defendant assumed the responsibility of being sworn to matters which were admittedly conclusions of law, but which were stated in unqualified language as positive averments of fact, such a course cannot be too strongly reprobated: per Mr. Justice MITCHELL.

Before PAXSON, C. J., STERRETT, WILLIAMS, MCCOLLUM and MITCHELL, JJ.

Nos. 129, 130, 131 January Term 1889, Sup. Ct. ; court below, Nos. 171, 190, 191 September Term 1887, C. P.

On August 3, 1887, a scire facias sur municipal lien No. 21 February Term 1887, was duly issued to No. 171 September Term 1887, wherein the city of Erie, for use of the Barber Asphalt Paving Co., was plaintiff, and "A piece of land on Eighth street, John C. Brady, assignee of the German Savings Institution, owner or reputed owner," was defendant. To Nos. 190, 191 September Term 1887, like writs were issued upon liens against a piece of land on Eighth street, the heirs of W. L. Cleveland, deceased, owners or reputed owners, wherein the same parties as above were plaintiffs.

On July 20, 1888, an affidavit of defence was filed in each case, averring in substance :

1. That the city of Erie was a city of the fifth class organized and acting under the act of May 23, 1874, P. L. 230, and the several supplements thereof, which said act and its supplements were unconstitutional and void, so far as they sought to confer upon the city of Erie authority to order pavements to be laid at the cost of abutting properties and liens to be filed therefor.

2. That the petition of the property owners and the ordinance providing for the pavement, called for an asphaltum pavement, while the pavement laid under the contract contained only five per cent of pure asphaltum, and by reason of the deficiency in asphaltum the pavement had become cracked and broken.

3. That at all times since the passage of the municipal act of May 23, 1874, the debt of the city of Erie had exceeded the constitutional limit, and as the ordinance provided that the city should pay the cost of paving all street intersections, and no provision was made to pay the same, the adoption of the ordinance was a direct attempt to increase the debt of the city without authority of law, and was therefore illegal and void ; that it was void

Opinion of Court below.

also because the consent of a majority of the property owners had not been obtained, and the ordinance was not advertised in the official paper of the city as required by law.

4. That the contract was illegal and void, because the ordinance provided only for the laying of a pavement, while the contract provided for constructing sewers, man holes and catch basins as well, and because the city did not provide for the payment of damages caused to property owners by changing the grade of the street.

5. That the municipal claim was void because it included the cost of said man holes, catch basins and sewers, while the ordinance provided only for the laying of a pavement in Eighth street; and because it was not accompanied with any specifications of the items of cost of said pavement, nor with any specifications or statement of the contract under which said pavement purported to have been constructed.

With the foregoing affidavit there were filed as exhibits, the city ordinance of February 25, 1878, accepting the provisions of the act of May 23, 1874, P. L. 230; the ordinance relating to the paving and curbing of Eighth street from Parade street to Walnut street, and providing for the assessment and collection of the cost thereof, and the contract and specifications with the Barber Asphalt Paving Co.

On October 17, 1888, by leave of court, a supplemental affidavit of defence was filed, which averred, *inter alia*, as follows:

“6. The councils of the city of Erie passed the ordinance for the paving of Eighth street, entitled ‘An ordinance relating to the grading, paving and curbing of Eighth street from Parade street to Walnut street and providing for the assessment and collecting the cost thereof,’ under which the work was done and the materials furnished, as claimed by the plaintiff in their case, without causing the engineer of the city of Erie to make an estimate of the ‘total cost of such improvement, particularly stating the items and the cost of each,’ and causing same to be attached to said ordinance before and at the time of its passage.”

Rules for judgment for want of sufficient affidavits of defence having been argued, the court, GUNNISON, P. J., on November 12, 1888, filed the following opinion and order:

Opinion of Court below.

The act of May 1, 1876, P. L. 94, provides "That the councils of cities in this commonwealth shall not pass any ordinances authorizing the grading or paving of any avenue, street or alley before they have caused the city engineer to make an estimate of the total cost of such improvement, particularly stating the items and the cost of each, ... which estimate, map, plan or schedule shall be attached to the ordinance before its passage and shall remain on file in the proper office for the benefit of all persons interested; and any ordinances which shall be passed by the councils of any city of this commonwealth authorizing the grading or paving of any avenue, street or alley before the provisions of this act are complied with, shall be null and void and of no effect; Provided, That the provisions of this act shall not extend to cities of the first class."

The ordinance under which the pavement, the cost of which is sought to be recovered in this proceeding, was laid, was approved June 17, 1876, and the defendants set up as a defence, *inter alia*, that the requirements of the act quoted above were not observed in its enactment.

The plaintiff contends, first, that the act of assembly is unconstitutional because local legislation, and second, that even if it is constitutional, and its requirements were not observed in the passage of the ordinance, the informality was cured by the act of May 17, 1887, P. L. 118.

I cannot agree with the learned counsel for the plaintiff that the act of 1876 is unconstitutional. It does not contain the objectionable features which were contained in the acts of May 23, 1874, and March 18, 1875, which provided that it should be optional with each city whether or not it should become subject to their provisions, thus making it possible for some cities of a particular class to become subject to them, while other cities of the same class were not so subject. It applies to all cities of the commonwealth excepting those of the first class. The classification of cities by the act of 1874 has been declared to be within the power of the legislature, and legislation for the government of all cities of any particular class therein constituted is general and not local legislation: *Wheeler v. Philadelphia*, 77 Pa. 338; *Kilgore v. Magee*, 85 Pa. 401. This act is general as to all cities excepting those of the first

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class, and the ordinance for the pavement if not accompanied "by the estimate of the total cost of the improvement, particularly stating the items and the cost of each," was, by the express terms of the act, "null and void and of no effect." That it was not accompanied by such estimate is alleged in the supplemental affidavit of defence, and that allegation, for the purposes of this rule, must be taken as true.

Was the informality in the passage of the ordinance cured by the act of May 17, 1887? After authorizing cities of the third, fourth and fifth classes to levy and collect taxes for general revenue, and for paying the interest on bonded indebtedness, and for the payment of loans to support the government and make necessary improvements, and giving priority of lien to such taxes, etc., it enacts: "And all taxes heretofore levied in any of the cities of the third, fourth and fifth classes in any one year, in amount not exceeding twenty mills on the dollar, and all assessments, made in pursuance of the ordinances of such cities, are hereby made valid."

The plaintiff contends that the expression, "all assessments," includes assessments for the cost of paving streets, which are made upon the property abutting the improvement, and which are not paid by general taxation. Is that the sense in which the expression is used in this act?

The word "assessment" is not exclusively applicable to local charges for street improvements. It is equally applicable to all kinds of taxes, and has been repeatedly used by the legislature in legislating upon the subject of taxation for general revenue purposes. The general tax laws provide for the "assessment of county taxes," the "assessment of school taxes," and the "assessment of state taxes." The supervisors of any township are authorized to "lay a rate or assessment not exceeding one cent on the dollar at any one time upon all real and personal estates within said township;" similar authority "to lay a rate or assessment" is conferred upon the overseers of the poor of any township. A similar use of the word occurs frequently in the municipal law of 1874 and its supplements, and indeed in many, if not most of the laws enacted upon the subject of taxation. It is my opinion that this is the sense in which it is used in the act under consideration, for the purpose of providing for all possible objections that may be raised to the tax

Opinion of Court below.

levies and assessments which were the subject of the act. Taken in this sense, the language is clear and unambiguous and germane to all the preceding provisions of the act. In the sense contended for by the plaintiff, it is vague, uncertain, and wholly unconnected with the subject and purposes of the act as expressed in the other portions of it. But if it is conceded that the word is used to indicate assessments for street improvements on property benefited by them, it may well be doubted whether the legislature intended it to be retroactive in its effect as to such assessments.

That the legislature has the power to pass retrospective laws cannot be doubted. A recent example of the exercise of that power is found in the act of April 30, 1885, P. L. 11, which enacted that all ordinances theretofore passed, levying taxes in any of the cities of the third, fourth and fifth classes, in amount not exceeding twenty mills in any one year, were validated; and the Supreme Court affirmed the validity of that act in *Erie City v. Reed*, 113 Pa. 468. It was the clearly expressed intention of the act that it should be retrospective in its effect. But there is no canon of construction better settled than this, that a statute shall always be interpreted so as to operate prospectively, and not retrospectively, unless the language is so clear as to preclude all question as to the intention of the legislature. "Retrospective laws generally, if not universally, work injustice and ought to be so construed only when the mandate of the legislature is imperative:" *Taylor v. Mitchell*, 57 Pa. 209; "No statute is held to operate retroactively unless its language admits of no other construction:" *Neff's App.*, 21 Pa. 243: "And nothing short of the most indubitable phraseology is to convince us that the legislature meant their enactment to have any other than a prospective operation:" *Dewart v. Purdy*, 29 Pa. 113. See also *Juniata Township*, 31 Pa. 301, and *Ihmsen v. Monongahela Navigation Co.*, 32 Pa. 153.

Here the language is: "And all taxes heretofore levied in any of the cities of the third, fourth, and fifth classes, in any one year, in amount not exceeding twenty mills on the dollar, and all assessments made in pursuance of the ordinances of such cities are hereby made valid." It will be seen that the word "heretofore," in the sentence, is only used in connection

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with the word "taxes" and is not used in connection with the word "assessments." The omission is significant, and indicates the intention of the legislature not to give the statute a retroactive effect as to assessments for street improvements, if that is what they meant by the word assessments. If they intended by the language to distinguish between general taxes and local charges, it is equally clear they intended to distinguish between the effect to be given to the act upon the two kinds of taxation. As to the one, its effect is retrospective, and as to the other, prospective. At least, it must be conceded that the language admits of that construction. It is the natural and grammatical construction. If I am correct in my conclusions as to this branch of the defence made by the defendants, their affidavit of defence is sufficient and it is unnecessary to consider the other questions raised.

The rule to show cause is discharged.

Thereupon the plaintiff took these writs, specifying that the court erred:

1. In discharging the rule for judgment.
2. In not entering judgment for plaintiff for want of a sufficient affidavit of defence.

Mr. F. F. Marshall (with him *Mr. T. A. Lamb*), for the plaintiff in error.

Mr. S. F. Davenport (with him *Mr. George P. Griffith*), for the defendants in error.

OPINION, MR. JUSTICE MITCHELL:

The affidavits in these cases are uncandid and evasive, being really affidavits to conclusions of law, carefully stated so as to appear to be facts.

The defence seems to be without merit either on the facts or the law, but on the affidavits the learned judge was clearly right in refusing judgment, as they contain positive averments, as of facts, of certain matters that if true would be a good defence. The principal of these, which is all we need notice in detail, is the unqualified averment in the supplemental affidavit, paragraph 6, that the councils passed the ordinance

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"without causing the engineer of the city of Erie to make an estimate of the total cost of such improvement, particularly stating the items and the cost of each, and causing the same to be attached to said ordinance before and at the time of its passage."

This, if true, was a good defence. The act of May 1, 1876, P. L. 94, expressly declares that any ordinances authorizing the grading or paving of streets, etc., before compliance with the requirements of the act as to such estimate, etc., shall be void. And this defect is not cured as to the present claims by the act of May 17, 1887, P. L. 118, as is very satisfactorily shown by the learned judge below.

It appears clearly by the admissions of the argument, both oral and printed, that in fact the provisions of the act of 1876 were complied with formally by the city engineer, but that the estimate made by him was not such an estimate as defendants chose to consider that the law required. It is hardly necessary to say that the proper mode of stating this defence was to set out a copy of the estimate, and an averment or suggestion of its defects, so that the court might determine whether or not it met the requirements of the law. Instead of doing this, the defendants not only assumed the responsibility of swearing to their own conclusions of law, but stated them as positive averments of fact, in the unqualified language already quoted. Such a course cannot be too strongly reprobated. But as this is all we have on the record, notwithstanding the concessions of the argument, the allegation in the affidavit must for the present purposes be taken as true.

The other averments, notably those in relation to the advertisement of the ordinance, and to the change of grade, and the statement that the contract departs from the ordinance by providing for sewers, appear to be equally devoid of truth, and made with equal recklessness, but it is not necessary to discuss them further, as it is clear that on the face of the affidavits there is a good defence, and that is sufficient to prevent judgment.

Order discharging rule for judgment affirmed.

Statement of Facts.

H. A. MARLIN v. S. W. WATERS.

ERROR TO THE COURT OF COMMON PLEAS OF WARREN COUNTY.

Argued May 10, 1887—Decided May 29, 1889.

[To be reported.]

1. If the plaintiff, filing a statement of claim in assumpsit under the procedure act of May 25, 1887, P. L. 271, neglect to serve a copy thereof upon defendant before return day, or give notice of the filing of it after return day, a judgment taken for want of an affidavit of defence is without authority and will be stricken off on motion.
2. Under said act, if plaintiff would hold the defendant to an affidavit of defence to be filed on return day, he must have served a copy of the statement fifteen days before that day; but, if a copy be not thus served fifteen days before return day, judgment for default of the affidavit may be taken fifteen days after notice of the filing of the statement.*
3. The clause in § 5 of said act, providing that judgment may be moved for, "in accordance with the present practice," etc., refers only to the mode of obtaining judgment, and specially to taking it for part of plaintiff's claim, but does not authorize judgment to be taken under a rule of court without service of a copy of the statement filed or notice of such filing.

Before PAXSON, C. J., STERRETT, GREEN, CLARK and MITCHELL, JJ.

No. 410 January Term 1889, Sup. Ct.; court below, No. 6 December Term 1887, C. P.

On August 5, 1887, H. A. Marlin brought assumpsit against S. W. Waters, filing with his præcipe and declaration a statement of claim upon two promissory notes made by the defendant to the order of George R. Wetmore and indorsed to the plaintiff. The summons was made returnable to the first Monday of October, which was the third day of the month, and was served upon the defendant on September 15th, as shown by the docket entries printed, and September 18th, as stated in the History of the Case. On October 1st the defendant appeared by counsel.

Rule 6 of the Rules of Court of Warren county is as follows:
 "In all actions founded on book accounts, bills, notes, bonds.

* See Weigley v. Teal, 125 Pa. 498.

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and other instruments of writing for the payment of money, and in all actions upon covenants or contracts for the payment of money, or for the performance of some other duty or thing of a specified cash value, whether under seal or not; in all suits upon recognizances, judgments, mortgages, mechanics' liens and other records, and in actions of debt on foreign judgments and the judgments of justices of other states, if the plaintiff shall have filed a copy of the account or instrument of writing on which the suit is founded, with his declaration, on or before the return day of the writ, he shall be entitled to a judgment by default for the amount so claimed, at any time after twenty days from and after the return day of the writ, unless the defendant, or some one for him, knowing the facts, shall have filed an affidavit of defence in which the nature and character of the defence shall be clearly and specifically stated."

On February 17, 1887, plaintiff upon præcipe to the prothonotary caused judgment to be entered.

On May 14, 1888, motion was made by the defendant to strike off the judgment thus entered for the reason that "no statement of the plaintiff's demand was served upon the defendant before the return day of the summons, and no notice was given to the defendant or his attorneys of the filing of the plaintiff's statement, as required by the act of assembly, approved May 25, 1887, in order to obtain judgment for want of an affidavit of defence."

On May 28, 1888, the court, BROWN, P. J., made the rule to show cause absolute, and ordered the judgment to be stricken off, for the reason assigned; exception: thereupon the plaintiff took this writ assigning said order as error.

Mr. J. B. Chapman (with him *Mr. W. B. Chapman* and *Messrs. Johnson, Lindsey & Palmer*), for the plaintiff in error.

Mr. Charles H. Noyes (with him *Mr. Watson D. Hinckley*), for the defendant in error.

OPINION, MR. JUSTICE MITCHELL:

The plaintiff took judgment for want of an affidavit of defence in accordance with the Rule of Court of the Common Pleas, without reference to the procedure act of 1887, and the

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court struck off the judgment for failure to comply with the provisions of that act. This raises the single question in the case, whether that act meant to leave prior methods of taking judgment for want of an affidavit of defence entirely unaffected, and to give a new and additional method of its own, or whether it intended to prescribe its method as the only proper one, and to supersede all others.

This question was virtually decided in *Gould v. Gage*, 118 Pa. 559, and has been so understood by the courts of this (Philadelphia) county: See *Friederich v. Anderson*, 22 W. N. 524. But as *Gould v. Gage* was argued rather upon the sufficiency of the copy filed, as a statement under the act of 1887, than upon the general question of the effect of the act on Rules of Court previously existing, the decision does not seem to have attracted general attention as to the latter point, and it may therefore be well to consider the matter a little more in detail.

The act was undoubtedly intended as a step towards uniformity of practice, and its provisions as to judgments for want of affidavits of defence are general, and applicable to all courts. Section 4 provides that "the plaintiff shall be at liberty to serve a copy of his statement on the defendant," and if such service is made not less than fifteen days before the return day, it shall be the duty of the defendant to file an affidavit of defence on or before the return day.

Section 6 provides that if the plaintiff shall neglect to serve a copy of his statement fifteen days before the return day, he may file it on, or any time after, the return day, and have judgment in fifteen days after notice of such filing.

The distinction between these two methods is plain. If the plaintiff wants to hold the defendant to an affidavit immediately on his coming into court, i. e., on the return day, he must *serve a copy of the statement*. If however he chooses to wait till the defendant is in court, as required to be on the return day, then plaintiff need only *file* his statement and *give notice*. Under this system, the defendant is not bound to any unreasonable diligence, nor in any danger of being taken unaware. He knows he must be served either with a copy before the return day, or with a notice after it. It is highly improbable that the act meant to leave him subject to a third contin-

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gency not imposed by its own terms, but by a Rule of Court. Thus in the present case the Rule of Court of Warren county entitles the plaintiff to judgment in twenty days without notice to the defendant, if a copy of the instrument of writing has been filed on or before the return day. If this rule is still in force, the defendant was liable in the present case to a judgment in fifteen days with notice, or in twenty days, without. A statute which as already said, was intended to promote uniformity, ought not to be so construed as to create or preserve such diversities, unless its language is perfectly clear to that effect.

The sole doubt arises from the fifth section, which provides that "judgment may be moved for want of an affidavit of defence, for the whole or part of the plaintiff's claim, as the case may be, *in accordance with the present practice* in actions of debt and assumpsit." It is however fairly inferable that this refers only to the mode of taking judgment, and specially to taking it for part of the plaintiff's claim. This, so far as I am aware, is only done under Rules of Court, at least I have not found any statute which directs or authorizes it, and it was probably with special reference to preserving this feature, as well as the general practice on the subject, that the fifth section was introduced. It was manifestly put in the wrong place, between the fourth and sixth sections. Those sections, as already seen, provide for the time and conditions of judgment, and should be read in immediate connection. The fifth, which refers only to the mode, has a separate branch of the subject, and logically should have either preceded or followed the other two. But, though thus somewhat out of place, its purpose in the general scheme is clearly to save the prior practice, but only so far as not superseded by the new provisions of the act. We are therefore of opinion that the parts of the Rule of Court relating to the time and conditions of filing the statement and taking judgment, were superseded by the direct provisions of the act, and as plaintiff's judgment failed to observe the latter, it was properly struck off.

Order affirmed.

D. E. RICE, JR., ET AL. v. JOHN RICE ET AL.

ERROR TO THE COURT OF COMMON PLEAS OF LANCASTER
COUNTY.

127 181
145 636

Argued May 20, 1889—Decided May 29, 1889.

- (a) In an action of ejectment, the defendants relied upon a deed from the father of plaintiffs and defendants, dated July 25, 1882. The plaintiffs showed that an inquest of lunacy on February 19, 1884, found that the grantor was insane, and had been since April 19, 1882.
- (b) The defendants made offers to prove declarations by the grantor made within fifteen months of the date when the insanity, as found, began, and within eighteen months of the date of the disputed deed, that he intended to execute "this conveyance" or "a deed" to the defendants.
- 1. In regard to the competency of evidence as to the insanity of the maker, there is no difference in principle whether the controversy be concerning the validity of a deed or of a will, and in this case, the declarations were not too remote to be admissible.
- 2. Nor was the variance between the declarations offered and what the grantor subsequently in fact did, of any weight; for, if the declared intention had been to make a gift, the variance was immaterial, and it was proper for the jury to be informed what the grantor's intentions had been when his sanity was unquestioned.

Before STERRETT, GREEN, WILLIAMS, MCCOLLUM and MITCHELL, JJ.

No. 72 July Term 1888, Sup. Ct.; court below, No. 9 May Term 1884, C. P.

On April 19, 1884, John Rice, and five others, his brothers and sisters, brought ejectment against Daniel E. Rice, Jr., and Joseph S. Rice, to recover a tract of 63 acres in Bart township. Issue.

At the trial on April 27, 1887, the plaintiffs showed title in Daniel Rice, Sr., their father, by deed dated March 23, 1875, for the consideration of \$4,725; that Daniel Rice, Sr., had died intestate on April 15, 1884, leaving the parties to the suit on both sides as his heirs at law. The plaintiffs then rested.

The defendants put in evidence a deed from Daniel Rice, Sr., to themselves dated July 25, 1882, for a consideration expressed

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in the deed of \$2,250, and that on the date of the deed Daniel E. Rice, Jr., had executed a bond conditioned for the payment of \$60 annually to Daniel Rice, Sr., during his life, and after his death to his widow, for life, and that a like bond had been executed by Joseph S. Rice, with a like condition for the payment of \$76 annually.

In rebuttal, the plaintiffs showed that on December 17, 1883, proceedings in lunacy were instituted against Daniel Rice, Sr., and that on February 19, 1884, there was a finding by the inquest that he was of unsound mind and had been for one year and nine months preceding the finding, that is from April, 1882.

To meet the plaintiffs' evidence as to mental incapacity, the defendants called a number of witnesses.

Samuel Hughes, called for defendants :

Mr. Brown : We propose to ask this witness to repeat the conversations that he had with Daniel Rice within a period of six months preceding April, 1882, the time of the stroke of paralysis, in which conversations Daniel Rice declared his intention to execute this conveyance to Daniel and Joseph, giving his reasons therefor, namely : that they had done more for him than his other children, and that he had spent enough on the other children, naming them.

Objected to.

By the court : Objection sustained ; exception.¹

Henry Girvin, called for defendants :

Defendants offer to prove by this witness that he knew Daniel Rice, Sr., intimately, for many years before his death, and in the year 1881, when Rice was unquestionably of sound mind, repeatedly heard him say that he, the said Daniel Rice, Sr., intended to execute a deed to the defendants for the property in controversy, giving his reasons for such intention.

Objected to.

By the court : Objection sustained ; exception.²

The same offer was made, to be supported by Ellwood Knox, called for defendants ; objected to, and objection sustained ; exception.³

At the conclusion of the testimony, the court, PATTERSON, J., instructed the jury, who returned a verdict in favor of the

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plaintiffs for six eighths of the land in dispute. Thereupon the defendants took this writ, assigning as error:

1-3. The refusal of defendants' offers.^{1 to 3}

Mr. B. F. Davis and *Mr. J. Hay Brown*, for the plaintiffs in error.

Mr. H. M. North and *Mr. W. M. Franklin*, for the defendants in error.

OPINION, MR. JUSTICE MITCHELL:

This case is clearly ruled by *Irish v. Smith*, 8 S. & R. 573. In regard to the competency of evidence as to the sanity of the maker, there is no difference in principle between a will and a deed, and the authorities have not admitted any.

The case of *Irish v. Smith* arose upon a contest as to a will, but the reasoning of C. J. TILGHMAN is equally applicable to the case of a deed: "The will of 1814 was impeached on two grounds: 1, for incapacity of the testator; 2, because it was obtained by fraud and improper management. In both points of view, it was proper for the jury to be informed what had been the testator's intentions when his understanding was unquestionable." And in *Wilkinson v. Pearson*, 23 Pa. 117, similar declarations were admitted in a contest as to the sanity of the grantor in a deed, and KNOX, J., put the admissibility expressly upon the principles of *Irish v. Smith*. In *Chess v. Chess*, 1 P. & W. 32, the same principle was applied to the much more doubtful case of declarations made subsequently to the execution of the deed, the court holding on the authority of *Irish v. Smith* that the evidence was competent on the question of sanity.

The declarations offered in the present case seem to have been excluded partly on the ground that they were too remote in time, though what period of time the court fixed is not clearly discoverable from the evidence printed in the paper book. It may be doubted if any limit of time can be absolutely fixed in regard to declarations admitted for the purpose in question, though of course the more remote they are the less weight they will properly be entitled to.

The finding of the inquisition dated the insanity of Rice

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from the stroke of paralysis in April, 1882, and the deed in controversy was made in July of the same year. The declarations offered were made in 1881 and the early part of 1882. None of them therefore was more than fifteen months before the alleged insanity began, or more than eighteen months before the disputed deed. They certainly were not too remote. In *Wilkinson v. Pearson* the interval was more than two years, but no question seems to have been raised on that ground.

Nor is the variance between the declarations offered and what Rice subsequently in fact did, of any weight. The first offer was of "an intention to execute this conveyance," and was not open even to this argument. The others were of an intention to execute "a deed." There was not therefore any real variance at all. But even if the declared intention had been to make a gift, as it seems to have been regarded by counsel, it would have been an altogether immaterial variance, as the fact that a grantor made a better bargain for himself than he had declared his intention to do when unquestionably sane, was certainly some proof of his competency to know what he was doing when he did make the grant.

The rejection of this evidence was therefore erroneous.

Judgment reversed and venire de novo awarded.

TOWNSHIP OF JACKSON v. ELLEN T. WAGNER.

ERROR TO THE COURT OF COMMON PLEAS OF LEBANON
COUNTY.

Argued February 22, 1889—Decided June 4, 1889.

[To be reported.]

1. Township officers are bound to anticipate and provide for the ordinary needs of travel conducted in the ordinary manner, and to remove obstructions and defects which would naturally or probably cause injury to the traveler along the highway.
2. But where the highway is an ordinary country road through an open cultivated region, with no unusual dangers or exposures, such officers are not bound to anticipate the dangers to which a broken wagon or a frightened horse may expose the driver.

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3. Where the plaintiff's horse, driven upon a highway, was frightened at an object for the presence of which in the highway the township was not responsible, and, turning suddenly, broke off a wheel, and dragged and overturned the carriage upon a stone heap at the roadside at a point where the roadway was not unsafe for ordinary travel, the township is not liable for the resulting injuries.

Before PAXSON, C. J., GREEN, CLARK, WILLIAMS and McCOLLUM, JJ.

No. 271 January Term 1889, Sup. Ct.; court below, No. 164 September Term 1887, C. P.

On September 8, 1887, Ellen T. Wagner brought statutory trespass against the township of Jackson, to recover damages for injuries to her person received when driving upon a public highway. Issue.

At the trial on November 12, 1888, the testimony showed, in substance, that on July 9, 1887, the plaintiff, with her sister and three children, were driving in a horse and buggy along a public highway called Mill street, laid out of the approved width of thirty-three feet. When near the village of Myers-town, the road going through an open and cultivated region, with no dangerous exposures, they passed a point where there had been a quarry opened at the side of the road. Stones had also been taken from the road-bed and piled alongside the traveled way for about twenty-five feet in length and at places several feet high, leaving, however, an unobstructed roadway of about fifteen feet in width to the water-way on the other side, though near the stone pile there was a hole or depression in the roadway caused perhaps by a washout.

After the plaintiff had passed some distance beyond the stone pile, the horse, becoming frightened by the sight of a couple of donkeys, one of which was in a cart and the other running loose, stopped short, turned round suddenly, broke down the left front wheel of the wagon and started back, drawing the wagon on three wheels and the hub of the broken wheel. When the stone pile was reached, the hub of the broken wheel struck it, as a hind wheel dropped into the depression in the road-bed, when the wagon was overturned, the plaintiff thrown out and seriously, and, as was claimed, permanently injured. The plaintiff testified that she had nearly stopped the horse, and

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that she believed that if it had not been for this hole, she would have stopped him in a moment.

The contentions of the parties sufficiently appear in portions of the charge to the jury, MCPHERSON, J.:

Just what the precise situation then was, there is some dispute about, and the jury must determine it from the evidence. One side testifies that the horse was under perfect, or substantially perfect, control; that it could easily have been guided and restrained; that the wheel being off on the left, or north side, would act as a brake, and make it more easy to control the horse; and that therefore, from that and the other circumstances in the case bearing upon the condition of things at that time, the plaintiff was negligent, either in not stopping the horse before they came to this pile of stones and the washout in the road, or, having come to or near that point, in not turning the horse away so as to avoid either or both of these obstructions in the road.

Now, that is of course a very important question. It is submitted to the jury for their determination as one of the important questions in the case. That is, entirely aside of the negligence of the township, was the plaintiff upon her part guilty of negligence which helped to bring about this accident—negligence which contributed to this accident? Was she careless herself?

So, taking all the facts into consideration; the facts that these women, with the children, were doubtless in a position of danger, and that there was a great deal in their situation to alarm them, and alarm them seriously—taking all these matters into account, the jury must decide, as I say, whether the plaintiff was guilty of doing anything, or omitting to do anything, which contributed to her accident or injury. If she was, she cannot recover.

If, however, you find that she did everything which in the circumstances ordinarily prudent persons would have done, then you come to the question whether the township has been negligent; that is, whether the supervisors have been negligent; because the case rests upon their doing or not doing, as the case may be. The supervisors are the officers in charge of the roads, and the township is responsible for their negligence with reference to the roads.

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A country road differs in some respects from a road that runs through a town. It is not necessary that a country road should be kept in a condition to be traveled from one side to the other. That would cause to townships an expense which in many cases, in most cases, indeed, they are not able to bear. There is no such requirement in our statutes, and no such rule of law. It is enough if a township keeps a sufficient portion of the road, the centre of the road, in good order, so that it can be traveled upon, and free from obstructions. Just how wide that portion ought to be is of course something that I cannot lay down to you, and it has never been laid down. It is not said, for instance, that there should be at least fifteen feet in the middle of the road, or that there should be at least twenty feet, or that ten feet is sufficient. The rule is that there must be a sufficient portion for ordinarily safe and convenient travel, upon the particular road and at the particular place. For instance, to illustrate that, a road that is unfrequently traveled—suppose one or two times a day—would properly get along with less care and with less of the road in order for travel, than a road over which vehicles were constantly passing. You can see that of course for yourselves without any further discussion of the matter. . . .

It is said here that that was not the case; that a portion of the road was obstructed by a pile of stones, and also by a washout, or hole, as it has been called; and those are the important matters in the case bearing upon the question of the negligence of the supervisors. I withdraw from the consideration of the jury entirely any question with reference to the stone quarry, and the degree to which it may or may not have encroached upon the road. In my judgment, that has nothing to do with the case. I do not see that it has been shown to have contributed to the accident in any way; and therefore, as I say, I instruct you to entirely disregard any testimony in the case with reference to this quarry being within the limits of the road. Just leave the quarry out of view entirely, and confine your attention to the pile of stones and the washout.

There is varying testimony with regard to this particular obstruction; as to the size of the pile of stones, and as to the depth, length and breadth of the hole. The jury must in the first instance find from the testimony, as best they can, taking the weight of it, what these obstructions really were; how

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high, how broad and how long was the pile of stones? So, with regard to the washout; how deep was it, and what was its position in the road? I understand it to be substantially agreed that it was in the traveled portion of the road, but the jury must determine. As I understand, the pile of stones was right along the side of the traveled track; and, quite near the foot of the pile, in the track of the road, was the washout; then came the track of the road a distance as to which the witnesses are not entirely agreed; then came the gutter, then the sidewalk, and finally the south line of the road.

Having determined the position and size of these obstructions, the jury must then decide whether they did unreasonably obstruct the road. Did they leave the rest of the road sufficient for the safe and convenient use of the public? If they find that they did not, then there would still be another question in the case; and that is the knowledge of the supervisors of their existence, and their failure to remove the stones or to fill up the hole. Because, although it might be that obstructions in the road made the road unsafe and inconvenient for travel, it would not follow that the township was responsible. It would still be necessary to show that the proper officers were in fault in neglecting to put things in their proper order.

I will briefly go over the steps at this point. You must find in the first place that the plaintiff was not guilty of contributory negligence. Then you must find that this road was unreasonably obstructed. Then you must find that the unreasonable obstruction of the road was due to the neglect of the supervisors. If you find any of those facts against the plaintiff, she has no case. If you find them all in her favor, then you come to a further point as to which there is little or no question: What directly caused her injury? You must find that her injury was caused by one of these obstructions.

Both sides agree that the overturning of the buggy, which was the immediate physical cause of her injuries—that, in connection with the stones, or wherever she fell; the jury will determine where it was—that the overturning of the buggy was caused either by the hole or by the stones; so that the jury, I take it, will have no difficulty in finding that her injuries were the result of contact with the stones or with the hole.

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If they decide that to be so, having found all the other matters to which I have alluded against the township, then they would come to the question of damages.

Those are some points to be answered. The plaintiff's points are as follows [inter alia] :

1. The township authorities are bound to keep the road in good condition, free from obstruction, so free that even a skittish horse may be employed without danger.

Answer : This is affirmed, although in a country road the whole width need not be kept in such condition.

2. If the injury of the plaintiff was caused by the township authorities not maintaining the road of sufficient breadth, or by improperly allowing excavations in the road, or by permitting dangerous holes to remain in the road, or by all or several of those causes combined, without proof of concurrent negligence on the part of the plaintiff, the plaintiff is entitled to recover.

Answer : The question of improper excavation in the road is not in the case, and that clause is stricken from the point. Thus modified, it is affirmed.¹

3. If the plaintiff was in the exercise of ordinary care and prudence, and the injury was caused by the insufficiency of the road, combined with some accidental cause, the defendant is liable, and the plaintiff is entitled to recover.

Answer : This is affirmed, if the insufficiency of the road arises from the defendant's negligence.²

4. If the jury believe that the injury to plaintiff resulted from the hub of the wheel striking the pile of stones, or running into a hole or excavation in the road, as described by the plaintiff, concurrently with the accidental fright of the horse and the breaking of the wheel of the buggy, the plaintiff is entitled to recover, unless the defendant can show contributory negligence on the part of the plaintiff.

Answer : The facts suggested are left to the jury ; the question of negligence is for them. But I may say here, in partial answer to that point, what I omitted to say in the charge, that although no doubt the accident of the horse taking fright was one of the causes, that in my judgment would not relieve the defendant from liability in case the township officers, the supervisors, had been guilty of neglect which helped to bring the

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injury about. Of course, if the horse had not run away, no accident would have happened. If the jury find from the evidence, that if it had not been for the neglect of the supervisors also, the accident would not have happened, then the township would be responsible, although the accident of the runaway may have been a partial cause. If there were then two causes contributing to the accident and the injury, namely, the accident of the runaway, for which nobody was to blame, and the carelessness of the supervisors, then the township would be responsible for the carelessness of the supervisors, although it was only one of the causes tending to bring about the injury.

The defendant's points are these [inter alia]:

1. That if the jury believe that the horse driven by the plaintiff frightened at a donkey on the public highway, after having passed the stone heap on the public road, and turned round and broke the wheel of the buggy in which she was riding, and the horse then ran away and, with the buggy thus injured, with the loss of a front wheel, was run against the stone heap and caused injuries, the township is not liable, and the plaintiff cannot recover.

Answer: This is refused. The jury must decide whether the supervisors were negligent in their care of this road, and, if so, whether their negligence was one cause of the injury. If it was one direct cause of the injury, the township would be liable, if the plaintiff herself was not guilty of contributory negligence.³

2. That if the jury believe that a sufficient portion of the road (being a country road) at the place where the plaintiff was thrown out of the buggy was kept in good condition for travel, the plaintiff cannot recover.

Answer: As a general proposition, a country road need not be kept in condition for travel from side to side. A sufficient portion of the middle only need be kept in smooth condition and safe and convenient for travel. The jury must decide whether at this point the road was negligently obstructed. If it was not, the plaintiff cannot recover.

3. If the jury believe that the horse was frightened by the donkey and in turning round broke the wheel of the buggy, and on account of this broken wheel that side of the front part of the buggy axle was on the ground and prevented the

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driver from guiding the horse to the right in order to avoid the stone heap, or if they believe that the driver had lost control of the horse, then the plaintiff cannot recover.

Answer: This is refused.⁴

5. If the jury believe that the horse driven by the plaintiff frightened at something on the road not a defect in the highway, and which the supervisors were not bound by law to remove, and the injury resulted from the horse running away through such fright, the plaintiff cannot recover.

Answer: If this means that the injury resulted *solely* from the horse running away, it is affirmed; but if it means that there could be no recovery, even if the injury was caused *in part* by the negligence of the supervisors, it is refused.⁵

6. That under all the evidence in the case the plaintiff is not entitled to recover.

Answer: This is refused.⁶

The jury returned a verdict in favor of the plaintiff for \$3,000. Judgment having been entered, the defendant took this writ, assigning for error:

1, 2. The answers to the plaintiff's points.^{1 2}

3-6. The answers to the defendant's points.^{3 4 5 6}

Mr. W. M. Derr, for the plaintiff in error:

1. The testimony of the plaintiff below clearly shows that at the time when the vehicle came in contact with the stone pile, there were but three wheels on the buggy, the fourth wheel had been broken, the hub thereof had been dragged along the road and the horse was unmanageable. The township is not bound to keep the roads in such condition as will prevent accidents to persons driving, either voluntarily or involuntarily, in unroadworthy vehicles and with unmanageable horses: *Gregory v. Adams*, 14 Gray 247; *McCormick v. Washington Tp.*, 112 Pa. 185, 197.

2. As the condition of the vehicle and the unmanageable conduct of the horse were in no wise imputable to the township, these circumstances, taken either by themselves or in conjunction with the existence of the stone pile, imposed no obligation upon the township to pay for the plaintiff's injuries: *Wharton on Neg.*, 2d ed., §§ 85, 103, 104; *Pittsburgh v. Grier*,

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22 Pa. 54; *Hey v. Philadelphia*, 81 Pa. 44; *Burrell Tp. v. Uncapher*, 117 Pa. 353; *Davis v. Dudley*, 4 Allen 557; *Murdock v. Warwick*, 4 Gray 178; *Lower Macungie Tp. v. Merkhoffer*, 71 Pa. 276; *Kelly v. Fond du Lac*, 31 Wis. 180; *Titus v. Northbridge*, 97 Mass. 258; *Horton v. Taunton*, 97 Mass. 266.

3. Assuming that it was a fault of the township authorities to permit the pile of stones to lie along the side of the road, yet the injury to the plaintiff, as it appears from her own testimony, was not a natural, probable and usual consequence of such fault, but was a result which could not have been foreseen by ordinary forecast, and therefore the plaintiff should not have been permitted to recover: *Monongahela City v. Fischer*, 111 Pa. 9, 13; *McGrew v. Stone*, 53 Pa. 436; *Hoag v. Railroad Co.*, 85 Pa. 293; *West Mahanoy Tp. v. Watson*, 116 Pa. 344.

4. Where it is alleged that an injury arose from negligence, the question of the proximate cause is to be decided by the jury upon all the facts of the case; but where the facts are undisputed, and the intervening agency is manifest, it is not error for the court to withhold the evidence from the jury. The intervening agency, to wit: the broken down buggy and the unmanageable horse, being manifest, the court should have withheld the evidence from the jury and instructed them to find for the defendant: *Hoag v. Railroad Co.*, 85 Pa. 293; *West Mahanoy Tp. v. Watson*, 116 Pa. 244; *Del. etc. R. Co. v. Cadow*, 120 Pa. 559.

Mr. Grant Weidman (with him *Mr. P. S. Keyser*), for the defendant in error:

1. This case, as we understand it, is ruled by the case of *Burrell Tp. v. Uncapher*, 117 Pa. 353, which decides: "If, in consequence of the negligence of a township to keep and maintain a public highway in a reasonably safe condition, an injury has been sustained by the plaintiff, it is no defence that the injury was caused by the combined effect of the negligence of the township and a negligent act of a third person." The same principle is decided in the cases of *Lower Macungie Tp. v. Merkhoffer*, 71 Pa. 276; *Hey v. Philadelphia*, 81 Pa. 44; *Norristown v. Moyer*, 67 Pa. 355; *Erie City v. Schwingle*, 22 Pa. 385. The jury, therefore, having found that the plaintiff

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was not guilty of contributory negligence; that the road was not reasonably safe for travel, but was unreasonably and unlawfully obstructed; that these obstructions were due to the negligence of the supervisors; and that the injury was caused by these obstructions, under the authority of the cases cited, the verdict was in accordance with the law and must be sustained.

2. "As a result of the cases, we may hold that where there is a hole or other defect in the road, against which a runaway carriage is wrecked, it is no defence that the horses were frightened and beyond control, if the obstruction is one which would impose liability had the horses not run away:" Wharton on Neg., 2d ed., § 984. "A town cannot relieve itself from liability for damages to a carriage from striking a defect which was negligently permitted, by showing that the carriage was itself defective, provided the defect was not known to the plaintiff or caused by his negligence:" Wharton on Neg., 2d ed., § 99. And see Beach on Cont. Neg. § 76; Hunt v. Pownall, 9 Vt. 411. The whole argument of the defendant is based upon two assumed facts, to wit: that the cause of the accident was the breaking of the wheel or the unmanageable condition of the horse, or both combined. The evidence clearly shows, and the verdict of the jury establishes, that neither the one nor the other, nor both together, caused the accident, but that it was caused by the hole and stone pile negligently left in the roadway by the supervisors.

3. It will become manifest from a perusal of the testimony that there was very little agreement as to how this accident occurred. The sufficiency and safety of the roadway; the size and location of the hole; the acts of the plaintiff; whether the horse was road-worthy or not; notice to the supervisors of the defects of the road; all these matters were subjects of dispute and argument before the jury. While we admit that in some cases it is the duty of the court to give binding instructions, yet in this case the rule is not applicable: McCully v. Clarke, 40 Pa. 406; Penn. Canal Co. v. Bently, 66 Pa. 34.

OPINION, MR. JUSTICE WILLIAMS:

This case presents an unusual question, one that is not clearly settled, and one of much more than ordinary impor-

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tance. The facts upon which it is raised are not involved in any serious controversy. The plaintiff was driving a horse and wagon along a public highway in Jackson township, Lebanon county. Her sister and three children were in the wagon with her. At one point there was at the side of the road an irregular pile of stones some twenty-five feet long and from one to two feet high, which had been taken out of the road in the immediate vicinity by the supervisors and left there until a convenient time for their removal. Between the stone pile and the gutter opposite, was an unobstructed roadway fifteen feet wide. The plaintiff drove over this part of the road without noticing that there was a stone pile near the road or any defect in the roadway. When about one hundred and twenty feet beyond the stone pile, her horse took fright at two donkeys approaching in the road, stopped, turned suddenly around, broke down the left forward wheel and let the axle fall to the ground. It then started rapidly back drawing the buggy on three wheels and the dragging axle. The axle acted like a rudder in drawing the horse and wagon to the north side of the road until when the stone heap was reached the axle struck it, the wagon was overturned, and the plaintiff injured. She testifies that at the same time the hind wheel dropped into a depression in the road which aided in overturning the wagon. A recovery was sought and had in the court below on the theory that it was negligence in the supervisors to leave the stone pile where it was, and to suffer the depression in the roadway to remain for several days unfilled.

The defence alleged that the road was in good condition, safe for all the ordinary purposes of travel, and that plaintiff's injury was chargeable to the fright of her horse, the breaking of her wagon, and her consequent inability to guide or control the horse and keep it within the limits of the traveled roadway. These, it was urged, were circumstances that the township was not bound to anticipate or provide against, and the injury received by means of them was one which was in no sense the natural or probable cause of the acts complained of. This line of defence was presented to the court in the defendant's points, the third of which asked the following instruction :

"If the jury believe that the horse was frightened by the donkey, and in turning round broke the wheel of the buggy,

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and on account of this broken wheel that side of the front part of the buggy axle was on the ground and prevented the driver from guiding the horse to the right in order to avoid the stone heap, or if they believe that the driver had lost control of the horse, then the plaintiff cannot recover."

In other words, this was a request for an instruction that if the injury received was due to the fright of the horse, the broken wheel, and the dragging axle, and not to a defect in the highway, the township was not liable. This should have been affirmed with some qualification as to the effect of mere loss of control by the driver; for, if the several facts assumed by the point had been found by the jury, the plaintiff was not entitled to a verdict.

Township officers are bound to anticipate and provide against the ordinary needs of travel conducted in the ordinary manner, and to remove obstructions and defects which would naturally or probably cause injury to the traveler along the highways; but the township is not an insurer against all possible accidents, nor is it bound to anticipate the danger to which a broken wagon or a frightened horse may expose the driver. Such a burden would be too heavy for any township to bear, and the law does not impose it. The general rule is well stated in *Hey v. Philadelphia*, 81 Pa. 44, to be that "roads and bridges are made for ordinary travel; if they fulfil such purpose they are sufficient, and those in charge of them are not responsible for extraordinary accidents occurring on them." Negligence is the absence of that measure of care which the circumstances require. The duty of road officers is to provide for the ordinary needs of travel, but this changes with a change of circumstances. Proximity to a precipice or a railroad track is a visible danger, and requires a degree of care in guarding against it not necessary under ordinary circumstances, yet it is only that care which common prudence would dictate in view of an unusual danger as necessary to safety in the ordinary use of the highway at that point: *Lower Macungie Tp. v. Merkhoffer*, 71 Pa. 276; *Hey v. Philadelphia*, supra; *Newlin Tp. v. Davis*, 77 Pa. 317.

The application of this rule to the case in hand is by no means difficult. The road in question is an ordinary country road passing through an open cultivated region, with no un-

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usual dangers or exposures. It was fifteen feet wide at the place where the accident occurred. The testimony tended to show that it was in ordinary repair and safe for the purposes of ordinary travel. It is true, there would have been from four to six feet more space over which a horse and wagon could pass if the stone pile had not been there, and it may be conjectured that such additional space would have enabled the plaintiff to pass this particular spot safely, but this alone is not enough to settle the defendant's liability. The question is whether this road was obstructed so as to interfere with its ordinary use, and whether such obstruction caused the injuries. The horse had passed this part of the road without the slightest inconvenience. There was no railroad crossing, no precipice, or other exposure, but the fright of the horse was at an object for whose presence in the highway the township was not responsible. The wheel was crushed by the sharp turn of the wagon, not by any defect in the highway. The dragging axle drew horse and wagon to one side of the road, so that the axle struck the stone pile and the wagon was overturned and the plaintiff hurt. Now the question is, not whether a broader road would have enabled the plaintiff to pass along safely with her frightened horse and disabled wagon, but whether the road was broad enough and good enough for the purposes of a highway in that place. Was it safe for the purposes for which it was made, and did it accommodate the traveling public using it in the ordinary manner, with reasonable facilities for travel?

That an accident did happen is clear, but that fact alone does not settle our question. It is necessary to inquire further whether the accident was the natural or probable result of any act or omission of the township officers which rendered the highway unsafe for the purposes of travel, conducted in the ordinary manner and by the ordinary means of conveyance. If it was, then the plaintiff ought to recover, and the fright of her horse, the breaking of her wagon, and her inability to guide her frightened animal, should not stand in the way of her recovery. These circumstances do not confer on her any rights she would not have possessed without them, nor give her any higher claim on the care of the township officers. On the other hand, they do not take from her any right to which *she in common with other travelers* was entitled in the use of

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the highway. It is the condition of the highway therefore, and not the succession of accidents that befell the plaintiff, to which the attention of the jury should have been held. Was the road on that day and at that place in a condition that made it a suitable and sufficient road for public travel conducted in the ordinary manner? If the jury had found, as the third point assumed, that the plaintiff's injury was not due to an unsafe condition of the road, but to the successive accidents which befell her, and which had no connection whatever with the road or with the doings or misdoings of the supervisors, then it is very clear that the township was not liable to pay her. If the jury had found against the township on the facts assumed, and that her injury was due to the existence of defects in the road which the exercise of common prudence would have required the removal of, for the safety of travelers using the public road in the ordinary way, then she would have been entitled to a verdict.

Judgment reversed, and venire facias de novo awarded.

COUNTY OF ERIE v. COMMONWEALTH.

ERROR TO THE COURT OF COMMON PLEAS OF ERIE COUNTY.

Argued May 1, 1889—Decided June 4, 1889.

[To be reported.]

1. The duty to keep a public highway in repair, devolves, at common law, upon the township upon which rests the duty of opening and making it; but where the expense of carrying the highway across a river or other considerable stream of water is greater than the township should bear, the act of June 13, 1836, P. L. 555, provides that the county may build the bridge and regulates the manner in which it may be done.
2. But, except in counties where the special act of April 13, 1843, P. L. 221, is in force, the law does not make provision for the care of such bridge after its erection by the county; that duty remains upon the township, and the completed bridge, when opened for public travel, becomes a part of the public highway and passes as such under the care

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of the township officers: Commonwealth v. Monroe Co., 2 W. & S. 495, followed; Howe v. Crawford Co., 47 Pa. 361, disapproved.

- (a) Road commissioners of a township in Erie county presented a petition setting forth the erection of a county bridge in 1836; that it had been partially destroyed by floods, freshets and ice, and that the county commissioners, although requested so to do, had refused to rebuild and reconstruct it; praying for a mandamus, etc.
3. The act of April 13, 1843, P. L. 221, was not in force in Erie county, and the proceeding, upon the facts of the case, was not under the act of May 5, 1876, P. L. 112, providing that when any county bridge should be destroyed or partially destroyed or swept away by floods, etc., it should be rebuilt by the county, subject to view and inspection as in case of an original erection.
4. As it was not alleged that the bridge had been blown down or swept away by floods, or destroyed by casualty, the question presented was over the duty to make repairs under the act of June 13, 1836, P. L. 555, and as that duty rested upon the township and not upon the county, the petition should be dismissed.

Before PAXSON, C. J., STERRETT, WILLIAMS, McCOLLUM and MITCHELL, JJ.

No. 366 January Term 1889, Sup. Ct.; court below, No. 50 May Term 1887, C. P.

On February 27, 1887, the road commissioners of LeBœuff township presented a petition in the name of the commonwealth setting forth that in 1836 proceedings were had in due conformity with the law, by which it was established that a county bridge was necessary over French creek at the crossing of the road from Waterford to Union; that said bridge had been duly constructed by the then county commissioners, and had been maintained ever since, the repairs in recent years having been made by the township; "that said bridge had been partially destroyed by floods, freshets and ice so far undermining one of the piers thereof as to make it necessary that the same should be immediately rebuilt;" that the petitioners had called upon the commissioners of Erie county to rebuild and reconstruct said bridge, so that it would be fit and safe for public travel, but they had refused so to do; praying the court to grant a rule on said commissioners to show cause why a mandamus should not issue, etc.

To the rule granted, the commissioners of Erie county answered that they had no knowledge that the bridge in question

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had ever been entered as a county bridge, and denied "that said bridge has been partially destroyed by floods, freshets and ice so far undermining one of the piers thereof as to make it necessary that the same shall be immediately rebuilt;" averring that "whatever damage it has suffered has been the natural wear and tear from constant use and the gradual wearing of the stream against its piers, and is not within the meaning of the act requiring county bridges to be reconstructed by the commissioners of the county."

Testimony having been taken and filed by *Mr. Ira E. Briggs*, appointed examiner for the purpose, an agreement was entered into by which trial by jury was dispensed with and the cause submitted to the decision of the court upon the testimony filed.

On August 8, 1888, the court, GUNNISON, P. J., filed a decision, which was as follows:

FINDINGS OF FACT.

The testimony disclosed the following material facts:

Upon the petition of a number of the inhabitants of LeBœuff township, representing that a bridge was much needed over French creek in said township, where the public highway from Waterford to Union Mills, crossed said creek, and that the erection of said bridge would require more expense than it was reasonable the said township should bear, the Court of Quarter Sessions, on May 5, 1836, ordered a view, under the provisions of § 21, act of April 6, 1802, 3 Sm. L. 520, which provided the manner of establishing and erecting county bridges.

No record of the report of the viewers then appointed, or of the action of the Court of Quarter Sessions, grand jury, or county commissioners thereon, can be found. But, that upon the report of the viewers it appeared to the court, grand jury and commissioners, that such bridge was necessary, and would be too expensive for the township to erect, and that it was thereupon established as a county bridge, appears from the subsequent records and papers which were offered in evidence. By them it appears that on December 28, 1836, the county commissioners contracted with William Boardman and Calvin Avery to erect the bridge for \$870. On October 17, 1837, the commissioners presented their petition to the Court of Quarter

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Sessions, setting forth the prior proceedings, and that the bridge had been completed agreeably to the contract, and praying for the appointment of six fit persons to inspect the said bridge, etc.; whereupon the court appointed six fit persons as prayed for, five of whom reported November 6, 1837, that they had inspected the bridge and the workmanship thereof; that it had been built and finished according to the agreement, and was a permanent and substantial structure. It must be taken therefore as proved that the bridge was a county bridge.

The testimony as to the present condition of the bridge is somewhat conflicting. But from it all I find that the abutments of the bridge, especially the east one, are in a dangerous condition; that this condition is partly the result of natural wear and tear, and partly the result of the action of the water and the floods and ice; and that they have become partially undermined by the current of the stream, the bed of which has become lower, exposing the wood foundation under the stone abutments at low stages of water to the action of the atmosphere, causing it to become decayed to such an extent as to cause the settling of the abutments. This settling has been gradual for a few years past and the abutments are now, partly in consequence of the settling and partly from the action of the frost, floods and ice, cracked, bulged out towards the stream, with some of the stone washed out, and in need of thorough repairs. I cannot find, however, that the particular damage done by floods and ice amounts to the destruction, partial destruction, or blowing down of the bridge, within the meaning of the act of May 5, 1876, P. L. 112. Floods and ice contributed, with the other causes I have named, to gradually affect the abutments and render the repairs necessary.

CONCLUSIONS OF LAW.

Having found as a matter of fact that the damage to the bridge caused by floods and ice did not amount to such destruction or partial destruction as is contemplated by the act of 1876, requiring in certain cases the county to reconstruct or rebuild county bridges, it follows that the provisions of that act do not apply to this case.

The question then is, is there any liability imposed upon the county to repair, aside from that imposed by that act?

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By the act of April 13, 1843, P. L. 221, it was enacted, "That, from and after the passage of this act, it shall be the duty of the county commissioners of the several counties of this commonwealth to repair all bridges erected by the county, and to pay such expenses out of the treasury in the usual manner," excepting as to certain counties named. By the act of April 6, 1854, P. L. 295, the exemptions of the counties mentioned in the act of 1843 from liability to repair county bridges, was extended to the county of Erie. Each of these acts is entitled: "An act supplementary to an act entitled 'an act relating to roads, highways and bridges,'" which is the title of the act of June 13th.

The Supreme Court in construing an act repealing the act of 1843 so far as it extended to Crawford county, in *Howe v. Crawford County*, 47 Pa. 361, held that the act of 1843 imposed upon the county the duty of repairing only such bridges as were erected under the act of 1836, to which it was a supplement; that the repeal of that act as to Crawford county relieved it from the duty of repairing such bridges only; that the bridge in question in that case having been built in 1820, under the provisions of the act of 1802, the duty of repairing it was imposed upon the county by the judicial proceedings of 1820, by which it was established as a county bridge, "and it was a continuing duty the repeal of the act of 1843 in nowise affected."

It was strenuously argued by the counsel for the defendants, upon the authority of *Commonwealth v. Monroe County*, 2 W. & S. 495, in which the Supreme Court held that "when a county bridge has been once legally built, such ordinary repairs as are necessary to preserve it fit for use are to be made by the supervisors of the township, as in the case of roads," and expressly concurred in the opinion of the court below, "that the county only erects bridges when the township is unable to do it, and in no case repairs bridges after they are erected," that the county is not liable for any repairs to any county bridge excepting such as are within the meaning of the act of 1876.

If the decision in *Howe v. Crawford County* had not been since rendered, I would be inclined to agree with this construction. But as I understand that case, which is a later utterance of the Supreme Court upon the question, [the liability here

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depends upon whether this bridge was originally erected under the act of 1802 or the act of 1836. If under the former, the county is liable; if under the latter, it is not liable.] *

In the case of *Howe v. Crawford County*, the bridge was clearly erected under the act of 1802. In this, the proceedings were begun prior to the passage of the act of June 13, 1836, P. L. 555, and completed after it went into effect, which was September 1, 1836. The order for the original view was made May 5, 1836. There is a hiatus in the record from that date until October 17, 1837, when on the petition of the county commissioners six fit persons were appointed to inspect the bridge and workmanship thereof, and make report, etc. There is no record of the report of the viewers appointed May 5, 1836, nor of the action of the court, grand jury and commissioners thereon. In the absence of such record, it must be presumed that the proceedings were regular and timely: *Omnia præsumuntur rite esse acta*. In due course, the report should have been made to the next term of the court following the appointment of viewers, and the action of the court, grand jury and commissioners thereon taken at the same time. The next term began on the first Monday in August, 1836, which was prior to the time prescribed for the act of 1836 to take effect. If the report of viewers was then made, and it then appeared to the court, grand jury and commissioners that such bridge was necessary, and would be too expensive for the township to erect, the act provided that it should be entered on record; and its character as a county bridge then became established.

The proceedings in 1837 were supplementary to the fixing of this character upon it. That such was the action is apparent from the subsequent proceedings, although the record of it is missing. That it was had at that time, before the act of 1836 took effect, must be presumed.

It may well be questioned whether, if the report of the viewers, with the finding upon it, was had after September 1, 1836, the proceedings would not be considered as under the act of 1802, the original view having been ordered under that act. The repealing clause of the act of 1836 is as follows: "All laws hereby altered or supplied so far as are inconsistent with this act are hereby repealed." But the act of 1802 was not

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inconsistent with the act of 1836 in respect of the proceedings to be taken in constructing county bridges. In opening roads there was a change in the manner prescribed ; but in respect to county bridges the provisions in the two acts were substantially identical, so that the act of 1802 was not expressly repealed in that respect, nor was it by implication. "When a late statute is repugnant to a former one only in part, it repeals the former one only so far as the repugnancy extends, and leaves all the remainder in force : " In re Contested Election of Barber, 86 Pa. 392 ; see also *Erie v. Bootz*, 72 Pa. 196 ; *The Hickory Tree Road*, 43 Pa. 139 ; *Spring Garden Road*, 43 Pa. 144 ; *Uwehlan Township Road*, 30 Pa. 156.

[Being of the opinion that the bridge was established as a county bridge under the act of 1802, it follows under the authority of *Howe v. Crawford County*, that the duty of repairing it devolves on the county of Erie.] ³

As to the extent of the repair necessary, the testimony is conflicting. Whether the abutments should be taken down and rebuilt, or whether they can be made safe without rebuilding, is not clear. It seems to me better that the commissioners should exercise their discretion after a thorough examination, than that they be explicitly directed by mandamus to rebuild them as is prayed by the plaintiff in its petition.

The court is requested by the plaintiffs to find as matter of law, that if the bridge in question is a county bridge, it was and is the duty of the county commissioners to keep the said bridge in safe condition and good repair, at the expense of the county of Erie.

Answer : Having found the bridge to be a county bridge under the act of 1802, the point is affirmed.¹

DECREE.

And now Aug. 6, 1888, I find for the plaintiff and against the defendants. The prothonotary is directed to give notice of this finding to the parties or their attorneys, and if no exceptions are filed hereto within 30 days after service of such notice, let judgment be entered by the prothonotary hereon, that a peremptory mandamus be awarded against the county commissioners of 'Erie county, commanding them to repair the bridge in the plaintiffs' petition mentioned.

Arguments.

Exceptions to the decision filed in behalf of the defendants having been dismissed, and judgment entered, the defendants took this writ, assigning as error:

1. The answer to the plaintiffs' point.¹
- 2, 3. The conclusions of law embraced in []^{2 3}

Mr. Clark Olds, for the plaintiffs in error:

1. The proceedings to have this bridge constructed were commenced May 5, 1836, under § 21, act of April 6, 1802, 3 Sm. L. 520, at which time a view was granted. The record does not show the subsequent action, but the presumption is the return was made to August Term 1836, and received the concurrence of the court, the grand jury and commissioners, as required by the act. But the act of 1802 was followed by the act of June 13, 1836, P. L. 555, which took effect September 1, 1836, after the return of the order to view. As the subsequent proceedings show, the bridge was completed under the act of 1836, and the court erred when finding that the bridge in question took its character as a county bridge under the act of 1802. It could not have such character, until all the requirements of the act of 1802, or those of the act of 1836, which supplemented the act of 1802, were complied with.

2. The provisions of the two acts are almost identical. One act is a re-enactment of the other. There is not a word in either act relating to the maintenance of county bridges by the counties which constructed them. How then can it be said that the county must repair all bridges built under the act of 1802, and not those built under the act of 1836? In *Commonwealth v. Monroe County*, 2 W. & S. 495, it was held: "The power to repair bridges is by the two latest acts of 1802 and 1836 given to the supervisors, as well as to erect bridges of a minor class, over small creeks and rivulets and deep gullies When a county bridge has been once legally built, such ordinary repairs as are necessary to preserve it fit for use are to be made by the supervisors of townships, as in the case of roads."

3. The court below decided the case at bar upon the dictum of the later case of *Howe v. Crawford County*, for the reason that the case was a later utterance of this court. But the court in that case went further than they were required to go in order to decide the question raised. That the legislature

Arguments.

did not intend county bridges to be repaired at the expense of the county, is evident from the subsequent legislation upon the subject. The act of April 13, 1843, P. L. 221, imposed the duty to repair upon the counties, with certain exceptions. The act of March 11, 1844, P. L. 86, extended the exception to other counties. The act of April 6, 1854, P. L. 295, extended the exception to Erie county. Then came the act of May 5, 1876, P. L. 112, requiring counties to rebuild and reconstruct bridges destroyed or partially destroyed by casualty. Wherefore, if by the act of 1802, the several counties were obliged to repair and reconstruct county bridges, they must also be obliged to do so under the act of 1836, and in such case, all the subsequent legislation upon the subject is superfluous. If the bridge in question has become so dilapidated that a new structure is necessary, the petitioners have mistaken their remedy, and they must proceed under § 35, act of June 13, 1836.

Mr. Theo. A. Lamb (with him *Mr. J. W. Sproul*), for the defendants in error:

1. The act of April 6, 1802, 3 Sm. L. 512, repealed all prior laws. In §§ 20 and 21, the legislature clearly distinguishes between bridges to be kept in repair by townships, and those to be kept up by the county. In bridges over small creeks and rivulets, the supervisors are required both to build and maintain them: but there is no requirement that supervisors shall repair bridges erected by the county, and thus no liability on their part to do so. We concede that the duty to repair is not specifically imposed by this act upon counties, but it would seem to follow *ex necessitate* from their obligation to erect, and thus thought this court, as shown in the case of *Howe v. Crawford Co.*, 47 Pa. 381. Moreover, this seems to have been the construction placed upon the act originally by the county authorities: *Smithfield Creek Bridge*, 6 Wh. 362, a construction sanctioned impliedly by § 23, act of April 15, 1834, P. L. 541, directing county commissioners to designate in their published annual statements, "all sums expended . . . in the repairs of old or the erection of new bridges," etc.

2. *Howe v. Crawford Co.*, 47 Pa. 361, decides that the act of April 13, 1843, P. L. 221, has no relation to bridges built under the act of 1802, and its title plainly shows this. It

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matters not, then, that the act of April 6, 1854, P. L. 295, extended the exemptions of the act of 1843 to Erie county. It does not reach this case. The bridge in question was made a county bridge in 1836. In the language of WOODWARD, C. J.: "How has the obligation to maintain it, been taken off the shoulders of the commissioners?" In our case, the bridge was built by the county, and as the act imposes the duty of repair on no one else, it falls upon the county: *Meadville v. Erie Canal Co.*, 18 Pa. 66.

3. Moreover, the act of April 13, 1843, P. L. 214, providing for the election of road commissioners in Erie county, in its §§ 20 and 27, clearly divested the road commissioners of the township of all jurisdiction in relation to the bridge in question. They have no power over it, nor right to repair or rebuild it. For them to expend money upon it, would be to misappropriate, and it follows necessarily that if it is not the duty of the county commissioners to take charge of the bridge in question, there is no one liable for its dangerous condition. It cannot be presumed that such a result as this was intended.

Mr. Clark Olds, in reply:

The act of April 13, 1843, P. L. 218, under §§ 20 and 27 of which it is claimed the road commissioners of Erie county were divested of the power to repair county bridges, was modified by the acts of April 15, 1857, P. L. 205, and May 16, 1857, P. L. 550; so that, as the law now stands, the road commissioners are authorized to make repairs to all bridges whenever necessary and to raise the money to defray the expense by a special road tax, if necessary.

OPINION, MR. JUSTICE WILLIAMS:

The duty to make repairs in a highway rests at common law on the township or other subdivision of the state on which the duty of opening and making the highway rests. The local road officers represent the district for which they are chosen, and must discharge the duty of opening and repairing the highways within it. Until the law-making power intervenes and separates the duty to open from that to repair, and imposes each upon different bodies or officers, the duty is one and rests on the officers of the township in which the road lies.

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It will sometimes happen, however, that the line of a road crosses a river or other considerable stream of water and that the expense of carrying the road across the water by a bridge is greater than the township is able to bear. In that case, the law provides that the county shall come to the aid of the township and build the bridge. The act of June 13, 1836, regulates the manner in which this may be done. The facts must be made known to the Court of Quarter Sessions of the proper county by a petition. Viewers are then appointed by the court to examine into and report upon the facts stated in the petition. The report of the viewers must be submitted to the grand jury for its approval. If this is obtained, the court and the county commissioners must also concur, before the expenditure of one dollar by the county is permissible. If the bridge is finally determined upon, an estimate of the cost must be made, and the building of the bridge may then be entered upon. After it is completed, it must be inspected by another view to be appointed by the Court of Quarter Sessions, and if they report to the court that the work has been properly done, the money may be safely paid out of the county treasury. The object of this legislation is to relieve the township by imposing a part of its duty under certain prescribed circumstances on the county, and paying the cost of discharging that duty out of the funds of the county which otherwise would not be applicable to such a purpose. But the law does not make provision for its care after its erection. That duty remains on the township, and the finished bridge, when opened for travel, becomes a part of the highway and passes as such under the care of the township officers. The county has no road officers. Its duty is simply to build the bridge, when the township cannot; and, that duty done, it has no further responsibility for its maintenance than for the maintenance of the roadway leading to or from it.

Such was the law in Pennsylvania until the act of 1843, as was clearly shown in *Commonwealth v. Monroe County*, 2 W. & S. 495. By the act of 1843 the duty of repairing county bridges was placed upon the county, but by the terms of the proviso and by subsequent acts about one half the counties of the state were excepted from its provisions. The county of Erie was taken out from its operation by the act of April 6,

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1854, and has since been under the rule that prevailed before the act of 1843 was passed. If this was not so, it is evident that the effect of the act of 1843 was confined to repairs, in the ordinary sense of that word, and could not authorize a rebuilding of the superstructure at the discretion of the county commissioners. This would still require all the formal prerequisites provided by the act of 1836, the petition, view, report, and the action of grand jury, court and county commissioners. The delay consequent upon these proceedings was sometimes found to work great inconvenience to the traveling public and to relieve against it the act of May 5, 1876, was passed. It provided that in all cases where a county bridge had been "blown down, destroyed, or partially destroyed, or swept away by floods, freshets, ice, storm, fire or other casualty," it should be the duty of the county commissioners to rebuild the bridge so blown down, destroyed or swept away, subject, however, to inspection in the same manner as an original construction. As the county of Erie is not under the act of 1843, it is not necessary to inquire particularly into its effects, nor to determine the relative duties of county and township under it.

This proceeding is not under the act of 1876, nor is it alleged that this bridge has been blown down or destroyed by casualty. The question presented is over the duty to make repairs under the provisions of the act of 1836, and we are clearly of opinion that the duty rests on the township and not on the county. The case of *Howe v. Crawford County*, 47 Pa. 361, on the authority of which the learned judge of the court below ruled this case, is in conflict with the *Commonwealth v. Monroe County*, *supra*, and with the rule now laid down. If the condition of the bridge is such as to justify its rebuilding under the act of 1876, it is possible that upon a proper application a mandamus may yet issue. If it is not, but its dilapidation is such that a new bridge must be built, it will be necessary to resort to a proceeding under the act of 1836. If however the question presented is, as we understand it to be, one about liability for ordinary repairs, the townships in the county of Erie are liable, and for that reason this petition should be dismissed.

The decree made in this case is set aside and the record remitted for such further proceedings as may be necessary under the foregoing opinion.

APPEAL OF JOHN A. HOHMAN.

[SPRECHER ET AL. V. SINGLE.]

FROM THE DECREE OF THE COURT OF COMMON PLEAS OF
LANCASTER COUNTY.

Argued May 21, 1889—Decided June 7, 1889.

1. Where the sheriff's vendee of real estate against which there was a subsisting mortgage, assumed the mortgage debt after the sale by giving his own mortgage for its amount, whereupon the original mortgage was satisfied, the transaction on its face is confirmatory of other evidence sustaining the contention of claimants upon the fund, that the property was sold subject to the original mortgage.
2. Upon the petition of the committee of an habitual drunkard, exhibiting an itemized account of his costs and praying that the court approve and order the payment of the same, a decree was made and entered upon the judgment docket that the estate of the drunkard pay said costs: such order was in the nature of a final decree in equity for the payment of money, and had all the effect of a lien from its entry in the judgment docket.

Before STERRETT, GREEN, WILLIAMS, MCCOLLUM and MITCHELL, JJ.

No. 111 July Term 1888, Sup. Ct.; court below, Vend. Exp., No. 14 November Term 1886, C. P.

On October 16, 1886, certain real estate of Simon Single was sold at sheriff's sale to John A. Hohman, the net proceeds amounting to \$465.29. This sum being paid into court, *Mr. Daniel G. Baker* was appointed auditor to report a distribution thereof.

The facts as found by the auditor were in substance that in 1882 Simon Single was the owner of a parcel of real estate in the city of Lancaster, on which were erected a two story brick dwelling house and out buildings. The property was covered as a whole by a mortgage executed by Single to the trustees of the Orphans' Asylum of Lancaster, for \$2,800, dated and recorded March 31, 1882. The erection of two new buildings upon the rear of the lot had been begun about March 1, 1882.

Statement of Facts.

On October 9, 1882, an inquisition finding that Single was an habitual drunkard was returned, filed, and confirmed nisi; and subsequently one Frank Pfeiffer was appointed and duly qualified as his committee. On June 16, 1884, an order of sale of Single's real estate was granted by the Court of Common Pleas. The property being returned unsold, an alias order was granted and a sale fixed for December 1, 1884. On that day, Single, who had been absent in Illinois during and after the inquest, filed a traverse to the inquisition. Thereupon the sale of the real estate was stayed, and on April 26, 1886, a jury was called and a verdict taken that Single was not an habitual drunkard, and the inquisition was thereupon reversed. On February 17, 1886, Pfeiffer, the committee, presented his petition setting forth his appointment as committee, that he would not contest the traverse pending, being then satisfied that Single was not an habitual drunkard, and exhibiting an itemized account of the actual costs which had been incurred by him under his appointment. On this petition a rule was granted, which on April 17, 1886, was made absolute, and a decree made that the sum of \$225.62 be paid by the estate of Simon Single to Frank Pfeiffer, committee, on account of said costs. This decree was entered in the judgment docket, as follows: "Simon Single's estate. Frank Pfeiffer, et al. April 22, 1886. \$225.62. Trust Book No. 9, page 269."

On June 11, 1886, on petition and motion of Frank Pfeiffer, a rule was granted upon Single to show cause why an execution should not issue to collect the amount so ordered to be paid, to wit: \$225.62. On the same day, a rule was granted upon Pfeiffer to show cause why the entry in the judgment index referred to should not be stricken off. After argument, the court, on August 14, 1886, entered a decree making the first rule absolute and awarding execution against Single for \$225.62, with interest from April 17, 1886. The rule relating to the entry in the judgment index was discharged.

Upon the execution thus awarded, as well as upon the writ indicated in the caption, issued upon a judgment in favor of Sprecher & Pfeiffer, the real estate of the defendant was sold to John A. Hohman, for \$575. There was evidence that at the day of sale, George M. Franklin, one of the trustees of the Orphans' Asylum, gave notice that the property would be sold

Statement of Facts.

subject to the Orphans' Asylum mortgage. John A. Hohman, the sheriff's vendee, was present when the notice was given, and on November 10, 1887, he executed and delivered to the Orphans' Asylum his own mortgage for the amount due upon the Single mortgage, and on the margin of the record of the latter mortgage an entry was made as follows: "November 10, 1887, this mortgage is paid, satisfied and released. [Signed] George M. Franklin, Treas. of O. A. [Seal.]"

Against the funds for distribution, the following claims were made:

1. A mechanics' lien against the new houses erected upon the rear of the lot, for \$30.22; filed about March 1, 1882.

2. The mortgage of the whole property to the trustees of the Orphans' Asylum, for \$2,800; recorded March 31, 1882.

3. Pfeiffer's costs, \$225.62, ordered to be paid by the decree of April 17, 1886.

4. A judgment for \$1,000 against Single, in favor of John A. Hohman, entered May 11, 1886.

Upon the evidence before him, the auditor found that the real estate was sold by the sheriff, by express agreement of the mortgagee, subject to the mortgage in favor of the Orphans' Asylum, and awarded the fund, after an ascertainment of the curtilage, 1. To the mechanics' lien; 2. To the decree in favor of Frank Pfeiffer, for costs; and 3. The balance to John A. Hohman's judgment.

To this report of the auditor, John A. Hohman filed exceptions, alleging that the auditor erred:

1. In finding that the real estate was sold subject to the mortgage of the Orphans' Asylum.¹

2. In not finding that the lien of the mortgage of the Orphans' Asylum was discharged by the sheriff's sale as to the new dwellings subject to the mechanics' lien.²

3. In awarding to Frank Pfeiffer the costs of inquisition per decree of April 17, 1886, \$225.62; said decree not having the force and effect of a lien.³

4. In awarding interest on said costs from April 17, 1886.⁴

5. In not awarding the fund, 1. To the mechanics' lien; 2. To the mortgage; and 3. To the judgment of John A. Hohman.⁵

These exceptions were dismissed by the court, PATTER-

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SON, J., and the distribution reported by the auditor confirmed, whereupon the exceptant took this appeal, specifying that the court erred:

1-5. In overruling said several exceptions.^{1 to 5}

Mr. C. I. Landis and *Mr. D. G. Eshleman*, for the appellant.

Mr. B. C. Kready and *Mr. A. J. Eberly*, for the appellee.

OPINION, MR. JUSTICE STERRETT:

The subject of complaint in the first and second specifications is the finding of fact that the real estate of Simon Single, the proceeds of which is the fund for distribution, was sold subject to the \$2,800 mortgage in favor of the Orphans' Asylum.

It is a mistake to suppose there was no evidence before the auditor to justify him in finding that fact. In addition to other testimony tending to prove that the property was sold subject to the mortgage, it was clearly shown that shortly after the sale, appellant, who was the sheriff's vendee, assumed the mortgage debt by giving his own mortgage for same amount, and thereupon the original mortgage was marked "paid and satisfied" by the mortgagee, on the record thereof. That transaction, on its face, is wholly inconsistent with his present contention that the property was sold clear of the mortgage. If it was so sold, why did he assume the payment of the mortgage debt, as the evidence shows he did? In view of all the evidence as to what occurred at the time of sale, as well as afterwards, there was no error in finding as complained of. The first and second specifications are therefore dismissed without further notice.

The third and fifth specifications relate to the costs of inquisition, etc., \$225.62, which the Court of Common Pleas, by its decree of April 17, 1886, ordered to be paid by the estate of said Simon Single.

The proceedings, which led to the making of that order or decree, were substantially as follows: In 1882, Simon Single, by inquisition duly taken, was found to be an habitual drunkard. Francis Pfeiffer, the appellee, was appointed committee of his person and estate and gave bond with sureties in \$15,800. In June, 1884, the court ordered a sale of the habitual drunkard's real estate, to which the committee made return, in November

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following, that the property remained unsold for want of bidders. An alias order was thereupon issued to sell on December 1, 1884, at seven o'clock P. M. On that day, before the hour of sale, a traverse of the inquisition was filed on behalf of the alleged habitual drunkard, and subsequently an order was made, staying the sale until the traverse was disposed of. That was done on April 26, 1886, by the verdict of a jury finding that the traversor "is not an habitual drunkard." In the meantime Pfeiffer, the committee, having become satisfied that the traversor was capable of managing his own estate, determined not to resist the traverse and ceased to act as committee. He accordingly presented to the court an itemized account of costs and expenses incurred by him as committee, etc., and asked the court to approve the same and order payment thereof out of the estate of said Simon Single. The result was the decree of April 17, 1886, above mentioned, which on April 22, 1886, was entered on the judgment docket. Afterwards the court awarded execution thereon, by virtue of which the real estate of Simon Single was levied on and sold. The proceeds of that sale constitute the fund for distribution.

The presentation of the committee's account and the action of the court thereon were manifestly intended as a final settlement; and the decree ordering payment of the balance due him is in the nature of a final decree in equity for the payment of money. It had all the effect of a lien from the date of entry in the judgment docket. In *Vincent v. Watson*, 40 Pa. 306, it was held that the balance due a committee of an habitual drunkard, as per his account filed and confirmed by the Court of Common Pleas, becomes a debt of record, the settlement of the account being in the nature of a decree in chancery. Our act of March 29, 1859, P. L. 289, provides that decrees for the payment of money shall be a lien on the real estate of the defendants or debtors named in the decree, in like manner and with the same force and effect as the lien of judgments rendered by common law courts, and shall be entered in like manner in the judgment docket of the proper county.

The order in question, being clearly in the nature of a decree in equity, and having been entered in the judgment docket, became a lien, from that date, entitled to participate in the distribution in its proper order. It was never reversed or modified.

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When the court ordered execution to issue thereon, a writ of error to the execution was taken, but that appears to have been non-prossed in this court. As a decree, having the force and effect of a judgment duly entered in the judgment docket, it remained undisturbed and unsatisfied at the date of the sheriff's sale, and being prior in date to appellant's judgment, it was, of course, entitled to be paid in full, in preference to his.

From what has been said, it follows that the fourth specification cannot be sustained.

Decree affirmed, and appeal dismissed at the costs of appellant.

APPEAL OF THE LANCASTER CO. N. BANK.

APPEAL OF E. H. HERSHEY.

[FIRST N. BANK V. HERR.]

FROM THE DECREE OF THE COURT OF COMMON PLEAS OF
LANCASTER COUNTY.

Argued May 22, 1889—Decided June 7, 1889.

1. Where land is devised at a valuation or price to be paid by the devisee, the money payable becomes a charge on the land in the hands of the devisee accepting the devise, with a lien which is superior to the lien of judgments subsequently entered against the devisee.
2. Releases executed by trustees of the person entitled to the valuation money, acknowledging payment thereof, though duly recorded prior to the entry of judgments against the devisee, do not relieve the land from the charge, if the evidence show that the money was not in fact paid and that the releases were without consideration.

Before STERRETT, GREEN, WILLIAMS, MCCOLLUM and MITCHELL, JJ.

Nos. 391 January Term 1889 and 93 July Term 1889, Sup. Ct.; court below, No. 12 January Term 1888, E. D., C. P.

On December 25, 1845, Abraham Herr died, testate, leaving a widow and nine children. By his will he devised a tract of

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land to his son Henry F. Herr, at a valuation of eighty dollars an acre, and directed that the sum of \$1,500 of the valuation money "be and remain charged on said premises, and my son Henry shall pay the yearly interest thereof, at the rate of five per cent, to my said wife Susanna during her lifetime." After providing for a legacy of \$500 to his son Abraham, the testator made the following provision as to his daughter Catharine's one ninth share:

"Item. It is my will, and I do order that my daughter Catharine's share, shall be invested in real estate by my executors, for the use and benefit of my said daughter Catharine, intermarried with Jacob Kreider, for her use and benefit during her natural life, and after her death, the same shall be equally divided amongst her children, share and share alike."

The will was duly admitted to probate, and letters thereon issued to testator's sons, Rudolph, Abraham, Christian F., John and Henry F., the executors named therein.

On June 17, 1887, two judgments were entered against Henry F. Herr, who had accepted the farm devised to him by the will, one in favor of the Lancaster County National Bank for \$7,041, and the other in favor of E. H. Hershey for \$1,000. Henry F. Herr remained in possession of the farm until December 31, 1887, when it was sold by the sheriff under process issued from a judgment upon a mortgage which antedated all other judgments against Henry F. Part of the proceeds were distributed to liens about which there was no dispute, and the balance of the fund, to wit: \$2,939.20, having been paid into court, *Mr. E. D. North* was appointed auditor to report a distribution.

The contest which arose was between the Lancaster Co. N. Bank and E. H. Hershey, who claimed that the fund in court should be awarded to them pro rata, on the one side, and the testator's daughter Catharine (intermarried with Jacob Kreider), on the other, who claimed that a portion of the fund should be awarded to the protection of her rights under the will.

On the part of the judgment creditors, certain releases were produced; one, dated May 19, 1851, recorded August 26, 1852, wherein Abraham Herr, Christian F. Herr and John Herr, three of the executors, acknowledged that, as executors and trustees

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of Catharine's share under the will, they had received all of her moneys then payable by Henry F. Herr, being all but the \$1,500 charged during the life of the widow, and released Henry F. and the land devised to him therefrom; another, dated April 1, 1883 (the widow Susanna having died), recorded November 16, 1886, wherein the same three, as executors and trustees of Catharine's share, acknowledged that they had received Catharine's share of the amount charged during the life of the widow, and released Henry F. and the lands devised to him therefrom.

On the part of Mrs. Kreider, evidence was adduced to show that when the foregoing releases were given no money whatever was passed, or had been paid before or since, on account of her share under the will, and that the releases were without consideration.

On September 8, 1888, the auditor filed a report which in part was as follows:

It is part of the proceeds of the sheriff's sale of this same land devised to the said Henry F. Herr by the last will and testament of his father Abraham Herr, deceased, which is now in court for distribution.

It has been decided by the Supreme Court, that where land is devised subject to the payment of the valuation money, the devisee takes the land subject to the payment of the sum with which it is charged, provided the devise be accepted: *Hart v. Homiller*, 23 Pa. 39.

The fund now before the auditor for distribution is claimed, on the one hand, by the judgment creditors of Henry F. Herr, they alleging that the said Henry F. Herr has heretofore paid to all the other heirs and legal representatives of the said Abraham Herr, deceased, their full and respective shares of the valuation moneys of the lands devised to him as aforesaid, including the \$1,500 charged thereon during the life of the testator's widow, Susanna, and that the said Catharine Kreider's share thereof was paid to her trustees for her use. On the other hand, the said Catharine Kreider claims that she is entitled to be paid out of the said fund, for her use during her natural life, the sum of \$166.66 as her share of the said sum of \$1,500 charged on said lands during the life of the testator's widow,

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Susanna, her share being the one ninth part thereof, and that at her death the said sum of \$166.66 is to be paid to her children, share and share alike, and that she is entitled in her own right to the interest on said sum of \$166.66, at the rate of 5 per cent per annum from April 1, 1887, to the date of the sheriff's sale, to wit: December 31, 1887; and further, that she is also entitled to be paid out of the said fund her share of the testator's estate which the testator directed his executors (of whom the said Henry F. Herr was one) to invest in real estate for her use and benefit during her natural life, and that she is entitled to the interest on her said share at the rate of 5 per cent per annum, during the term of her natural life, and that at her death the said share shall be equally divided amongst her children, share and share alike, in accordance with the testator's will; and that she is entitled in her own right to the interest on her said share of the testator's estate, at the rate of 5 per centum from April 1, 1887, to the date of the sheriff's sale of the said premises, to wit: December 31, 1887; she alleging that the said Henry F. Herr has never paid out her share of the said sum of \$1,500 charged on said lands during the life of the testator's widow, Susanna, and that he has never paid out her share of the valuation moneys of the lands devised to him by the testator's will, nor her share of the testator's estate, and that these respective sums remained charged on said lands at the time of the sheriff's sale thereof, and are entitled to priority of payment out of the proceeds of said sale; and alleging further, that the said Henry F. Herr has paid to her annually and regularly until April 1, 1887, the interest, at the rate of 5 per cent per annum, on the said sum of \$166.66, as her share of the said sum of \$1,500 charged on said lands during the life of the testator's widow, Susanna, and also on the sum of \$534.90, as the one fourth part of her share of the testator's estate (other than the said sum of \$1,500), both of which sums, she alleges, Henry F. Herr always acknowledged were part of the valuation moneys of his said lands and still remained charged thereon, neither of the said sums ever having been paid out by him. What the amount of Catharine Kreider's share in the testator's estate (exclusive of her share of the said sum of \$1,500), was, will appear further on.

In support of the allegation of the judgment creditors, that

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the said Henry F. Herr has paid off the whole of the valuation moneys of the lands devised to him by the testator's will, they say, that excepting the sum of \$1,500 charged on said land during the life of the testator's widow, Susanna, there was, on May 19, 1851, by mutual agreement of the heirs, a complete and final settlement and distribution of the whole of the testator's estate amongst all of the heirs and legal representatives of the testator, other than his son Rudolph, whose advancement and indebtedness to the testator's estate far exceeded the share of one of the children therein, according to the report of an auditor appointed by the Orphans' Court of Lancaster county to distribute the whole of the testator's estate according to his will, and to establish this fact they offer in evidence the record of the following releases, to wit:

* * * * *

Has Henry F. Herr paid to the other heirs of the said Abraham Herr, deceased, their full and respective shares of the valuation moneys of the lands devised to him, including \$1,500 charged thereon during the life of the testator's widow, Susanna Herr?

Christian F. Herr and John Herr, two of the testator's sons, and two of the executors of his will, and, as such, trustees under said will of the share of the testator's daughter, Catharine Kreider, both say that the said Henry F. Herr did not, either at the time of the execution of the above-mentioned release from Abraham Herr's heirs to Henry F. Herr, dated April 1, 1883, nor at any other time, before or since, pay to them, respectively, any part of the share of Catharine Kreider, in the said sum of \$1,500 charged on said lands during the life of the testator's widow, Susanna; and Catharine Kreider, herself, says that she never received any part of the principal of said sum; and she also says, and the evidence is uncontradicted, that Henry F. Herr has paid to her the interest on the said sum of \$166.66 (as her share of the said \$1,500), at the rate of five per cent per annum, annually and regularly up to April 1, 1887; and Solomon Zeamer, a son-in-law of Catharine Kreider, swears that Henry F. Herr told him that Catharine Kreider's share of this money was never paid out and still remains in the land, and that he paid her the interest on her share of the said \$1,500, to wit: On the sum of \$166.66, an-

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nually, at the rate of five per cent per annum. This he told him when he paid her the interest on April 1, 1887. The veracity of these witnesses is unimpeached and their testimony is uncontradicted except in so far as it is contradicted by the above release. The auditor has no hesitation in finding the facts as sworn to above.

Abraham Herr, another of the executors of the will, and one of the trustees of Catharine Kreider's share of the estate, is dead, and Henry F. Herr, the other trustee, has left for parts unknown.

From the evidence the auditor finds, that Catharine Kreider's share of the said sum of \$1,500, to wit: the one ninth thereof, or the sum of \$166.66, has never been paid out by the said Henry F. Herr; that the said sum is part of the valuation moneys of the lands devised to him by the testator's will; that he has paid the interest thereon, at the rate of five per cent per annum, to Catharine Kreider until April 1, 1887; that the said sum of \$166.66, together with interest thereon from April 1, 1887, at the rate of five per cent per annum, was a valid and subsisting charge on the lands devised to him, at the time of the sale thereof, and entitled to priority of payment out of the proceeds of the sale of said lands in preference to the judgments against him, and that, so far as Catharine Kreider and her children are concerned, the above mentioned release is without consideration, and therefore void as to them. See *Bixler v. Kunkle*, 17 S. & R. 298; *Witman's Appeal*, 28 Pa. 376; *Powell's Appeal*, 98 Pa. 403.

John Herr, one of the executors of the testator's will, was called as a witness in behalf of Catharine Kreider, and, with reference to the alleged settlement of the testator's estate on May 19, 1851, and the share of Catharine Kreider in said estate, he testified as follows: "My brother Rudy was one of the executors of the will. We couldn't trust him with any of the money then, and we four others named as executors, agreed to divide Catharine's share among us, and pay her the interest annually, and at her death the principal to her children, as provided in the will." He also says: "At the time when we four executors agreed to divide Catharine's share among us, there was no money handled. There was none of Catharine Kreider's money handled at any time." In answer

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to the question, "Was the one fourth of Catharine Kreider's share left by each executor in his property, and is that what you mean by dividing her share?" the witness says, "Yes, sir; that is what I mean." He also says that Henry F. Herr did not pay to him, nor to anybody else so far as he knows, any money on account of the share of Catharine Kreider in the estate of her father, Abraham Herr, deceased, either at the time when the above-mentioned release, dated May 19, 1851, was executed, or before, or after. He also testifies that he, the witness, paid the interest to Catharine Kreider yearly on \$534.90; that he paid her the interest every year; that the last payment he made was in April, 1887, and he says: "Of course the \$534.90 was part of the money that I was to pay under my father's will, and I kept that for Catharine Kreider, my sister."

* * * * *

Catharine Kreider testifies that she never got any money from her father's estate, except the interest; that she got that all every year until the spring of 1887, and then she did not get Abraham's; that she got Henry's in the spring of 1887; that her share of her father's estate has never been paid to her; that she has never seen anything of it; that she was never present at any family settlement of her father's estate, and that they never asked her for anything. She never signed any of the releases, nor received any of the moneys except for interest, as above stated.

From the evidence the auditor finds, that in addition to the said sum of \$166.66, which Henry F. Herr had in his hands as the share of Catharine Kreider in the said sum of \$1,500 charged upon his said lands during the life of the testator's widow, Susanna, which was part of the valuation moneys of the lands devised to him as aforesaid, and which was a valid and subsisting charge on said lands at the time of the sheriff's sale thereof, he also had in his hands the further sum of \$534.90 as part of the share of Catharine Kreider in the estate of her father Abraham Herr, deceased, the interest of which was to be paid to her annually, at the rate of five per cent per annum, during her natural life, and at her death the same to be equally divided amongst her children, share and share alike, as directed in the testator's will; that the said Henry F. Herr has never

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paid out the said sum of \$534.90 to Catharine Kreider, or for her use; that he has paid to Catharine Kreider the interest on the said sum of \$534.90, up to April 1, 1887, at the rate of five per cent per annum; that the said sum of \$534.90 is part of the share of Catharine Kreider in the testator's estate, and part of the valuation moneys of the lands devised to the said Henry F. Herr, by the testator's will; that the said sum of \$534.90, together with the interest thereon from April 1, 1887, at the rate of five per cent per annum, was a valid and subsisting charge on said lands at the time of the sheriff's sale thereof, on December 31, 1887, and that the said sum of \$534.90, together with interest thereon from April 1, 1887, to December 31, 1887, at the rate of five per cent per annum, is entitled to priority of payment out of the proceeds of the sheriff's sale of the said lands, in preference to the judgments against the said Henry F. Herr.

It may be added, also, that judgment creditors are not within the protection of the recording acts, and that they stand in the shoes of their debtor and can claim no greater rights than he himself possesses. If Catharine Kreider had brought suit against Henry F. Herr, for the recovery of these moneys, could he, under the circumstances, have defended successfully, on the ground that he had paid these moneys out? Clearly not; and if he could not, neither could his judgment creditors, who stand in his shoes and have no greater rights than he himself possesses. See *Reed's Appeal*, 13 Pa. 476; *Rodgers v. Gibson*, 4 Y. 111; *Heister v. Fortner*, 2 Binn. 40; *Cover v. Black*, 1 Pa. 493; *Morris v. Ziegler*, 71 Pa. 450; *Ludwig v. Highley*, 5 Pa. 132; *Cadbury v. Duval*, 5 Clark 206.

Hence it follows that in the distribution of the fund now before the auditor, the judgment creditors must be postponed to the claims of Catharine Kreider.

The auditor accordingly recommended a decree distributing \$701.56 to the use of Catharine Kreider, the interest to be paid to her during life, and the principal to be divided among her children after her death, and \$26.31 interest on said sum from April 1, 1887, to December 31, 1887; the balance of the fund for distribution to go to the bank and to Hershey, pro rata.

The bank and Hershey both excepted to the allowance of

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Catharine Kreider's claim. The exceptions were overruled by the court, PATTERSON, J., and the auditor's report confirmed absolutely, whereupon the bank and Hershey each appealed, assigning for error the dismissal of their exceptions and the confirmation of the auditor's report.

Mr. Wm. Aug. Atlee (with him *Mr. B. C. Kready*), for the appellants.

Mr. H. M. North, for the appellee.

LANCASTER CO. N. BANK'S APPEAL.

PER CURIAM:

The questions presented by the specifications of error in this case were rightly disposed of by the learned auditor and the court below. Neither of the assignments of error is sustained.

Decree affirmed and appeal dismissed at the costs of appellant.

HERSHEY'S APPEAL.

PER CURIAM:

The questions involved in this case are substantially the same as those presented in Lancaster County National Bank's Appeal, No. 391 January Term 1889, in which the decree of the court below has just been affirmed. By agreement of counsel the same decree is to be entered in this case.

Decree affirmed and appeal dismissed at the costs of appellants.

EDWIN MYERS v. ELLEN G. BENTZ.ERROR TO THE COURT OF COMMON PLEAS OF YORK
COUNTY.

Argued May 23, 1889—Decided June 7, 1889.

(a) A testatrix devised a house and lot to her three daughters, subject as follows: "It is my will and desire that my said daughters shall have . . .

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the use and benefit of my said house and lot, jointly, so long as they shall remain single and unmarried, but in case either of my said daughters shall marry, then such daughter shall forfeit her right to the use and benefit of my said real estate, and the use and benefit of the same shall inure to the benefit of my remaining unmarried daughters or daughter, during their natural lives or the life of the survivor of them.

- (b) "It is further my will that the survivor of my unmarried daughters shall have the right to dispose of my said house and lot by will or otherwise, but in the event that either of my said daughters should die unmarried, then the share of such daughter in the said real estate shall descend to my remaining single or unmarried daughters or the survivor of them. Should all of my said daughters marry, then the property shall be sold by them or the survivors of them and the proceeds shall be equally divided among them or their legal representatives."
- (c) The testatrix bequeathed and devised, also, "all the rest and residue" of her estate to her said three daughters. One of said daughters died, intestate, unmarried and without issue, leaving her two sisters, also two brothers and children of a deceased brother, to survive her. Subsequently, the two surviving sisters, who were both unmarried, united in conveying the house and lot for a full consideration.
1. In such case, the two surviving sisters were vested with a valid fee simple title to the premises devised, and their deed conveyed such a title to their grantee.

Before STERRETT, CLARK, WILLIAMS, MCCOLLUM and MITCHELL, JJ.

No. 9 July Term 1889, Sup. Ct.; court below, No. 62 January Term 1889, C. P.

Case stated in which Ellen G. Bentz was plaintiff, and Edwin Myers defendant:—

On January 9, 1889, by contract in writing, Ellen G. Bentz agreed to convey to Edwin Myers a certain house and lot in the city of York, a title in fee clear of all incumbrances to be delivered on February 1, 1889, for a consideration of \$4,600.

On February 1, 1889, Ellen G. Bentz tendered to said Edwin Myers a deed purporting to convey said property in accordance with the written agreement, but said Myers declined to accept the same, denying that it conveyed a title in fee.

The plaintiff's title tendered was as follows: One Mary Ahl was seized in fee of the premises so agreed to be conveyed, and prior to her death made her last will and testament, which was, after her death, to wit: on March 16, 1874, admitted to probate in the register's office of York county, in which she devised the said property, as follows:

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"Item "I give, devise and bequeath unto my three daughters Mary Ahl, Louisa Ahl, and Catharine Ahl, my brick house and half lot of ground situate in the borough of York afore-said, ... subject however to the following reservations and provisions, to wit: It is my will and desire that my said daughters shall have the use and benefit of my said house and lot, jointly, so long as they shall remain single and unmarried, but in case either of my said daughters shall marry, then such daughter shall forfeit her right to the use and benefit of my said real estate, and the use and benefit of the same shall inure to the benefit of my remaining unmarried daughters or daughter, during their natural lives or the life of the survivor of them. It is further my will that the survivor of my unmarried daughters shall have the right to dispose of my said house and lot by will or otherwise, but in the event that either of my said daughters should die unmarried, then the share of such daughter in the said real estate shall descend to my remaining single or unmarried daughters or the survivor of them. Should all of my said daughters marry, then the property shall be sold by them or the survivors of them and the proceeds shall be equally divided among them or their legal representatives.

"Item. And as to the rest and residue of my estate, if any, I give devise and bequeath the same to my said three daughters, in equal shares."

After the death of said testatrix, and before the conveyance of said property to Ellen G. Bentz, the plaintiff, Mary Ahl, one of the three daughters of said testatrix and devisees of said real estate under said will, died, intestate, unmarried and without issue, leaving to survive her, her two sisters, Catharine and Louisa Ahl, the other two devisees, and two brothers and the issue of a deceased brother.

On April 3, 1882, the said Louisa Ahl and Catharine Ahl, the two surviving devisees under said will, being both of full age and unmarried at the time, made a deed, bearing date on that day, regularly executed and purporting to convey said house and half lot of ground in fee to said Ellen G. Bentz, pro ut said deed made part of this case, for the sum of \$3,500, (which was a full and fair price for said property,) who thereafter went into possession and erected thereon a dwelling-house at a cost of about \$12,900.

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The said Catharine and Louisa Ahl are still living and unmarried.

If the court shall be of opinion that under the provisions of said will or otherwise, the deed of said Louisa and Catharine Ahl conveyed to or vested a good title in fee simple in said Ellen G. Bentz, for the property in question, judgment to be entered for the plaintiff for one hundred dollars damages ; and if not, then judgment for the defendant with costs ; with right to either party to sue out a writ of error to the Supreme Court.

On March 20, 1889, the court, LATIMER, J., filed the following opinion :

The intention of the testatrix, Mary Ahl, to dispose of her entire estate is plain. She commences with the words, " And as to such worldly estate as I may be possessed of at the time of my death, I dispose of the same as follows : " and concludes with the words, " And as to the rest and residue of my estate, if any, I give and bequeath the same." The will is inartificially drawn, but taking the whole together, it is sufficiently clear that she intended to dispose of all her property, not to die intestate as to any part of it. Says Justice SHARSWOOD, in *Geyer v. Wentzel*, 68 Pa. 85, 87, this, to be sure, is never a conclusive argument in favor of a construction which passes a fee, but the courts have invariably laid hold of introductory or other words indicating such an intention, as they do of every other circumstance in a will which may help to guide their judgment to the true construction of it.

It is equally clear that the testatrix's three daughters, Mary, Louisa and Catharine, were not merely the principal, but the only objects of her solicitude and bounty. They are the only beneficiaries named in the will, and there is no devise over. To them is given everything that passes by the will. *Prima facie* the first taker is always the principal object of testator's bounty, and in doubtful cases the construction leans in favor of making the gift to him as effectual as possible : *Rewalt v. Ulrich*, 23 Pa. 388. While not conclusive, still the plain intent to dispose of her entire estate for the benefit of these three daughters, is a most important and controlling consideration in determining the quantum of the estate in her realty given to them by her will.

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It is, however, contended by defendant's counsel that there is a contingency, on the happening of which this testatrix must be regarded as dying intestate as to the realty, the title to which is in controversy in this suit. For, they say, the paragraph in the will disposing, *eo nomine*, of this lot of ground, gives to the daughters but a life estate, with a power of disposition of the same in the one who shall become the unmarried survivor; and that if the said survivor shall die without executing the power, this real estate will descend to the heirs of the testatrix under the intestate laws. And further, they contend that the deed of conveyance to the plaintiff from the two surviving devisees in the will, was not a valid execution of the power, because, by its terms, it was to be executed by the single survivor, who had not, at the date of that deed, and has not yet been ascertained by the death or marriage of all but one; and that a power to be exercised on the happening of a particular event, or at a particular time, cannot be legally exercised before the time comes, or the event happens.

As already indicated, this construction would be contrary to the manifest intent of the whole will, to give the entire estate to the three daughters. And it has the further vice of being based on a part only of the will, *viz.*: that paragraph which disposes, *eo nomine*, of the lot in controversy. Besides all this, a power of absolute disposal, even coupled with the grant of a life estate only, is sufficient to vest a fee, when there is, as here, a manifest and general intent of the testator which would be defeated by adhering to the particular intent: *Church v. Disbrow*, 52 Pa. 219-23; *Grove's Est.*, 58 Pa. 429. Certainly when the time arrives, as it must in the natural order of events, that one of these daughters shall be the sole survivor, she will have the absolute power of disposal of this land, and her estate will be a fee. Until the survivor is ascertained, the fee rests between the three devisees.

It is difficult, and probably unnecessary to define with technical accuracy the estate in these devisees created by the paragraph of the will now under consideration. With approximate correctness it may be said to be an estate for their joint lives, subject to be divested as to either one marrying, with alternative remainder in fee to the survivor. Certain it seems that by the operation of this paragraph alone, the fee resided among

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the three devisees, and their conveyance in fee to this plaintiff, joined in by all of them, carried it to the plaintiff. Even if the fee were in abeyance during the currency of the life estate, and would only vest in the survivor at the death or marriage of the others, such survivor would be estopped to claim against her deed: *Brown v. McCormick*, 6 W. 60; *Washabaugh v. Entriken*, 34 Pa. 74. Regarding the estate in the devisees as merely a life estate, with a power of disposition in the survivor, and not to be exercised until the survivor is ascertained,—a construction so contrary to the general intent as to be in my judgment entirely untenable,—still as there is no devise over, and the postponement is solely for the benefit of the life tenants, they could consent to its exercise before the period, and, all joining in the deed, the survivor would be estopped to assert a right contrary to it: *Styer v. Freas*, 15 Pa. 339; *Gast v. Porter*, 13 Pa. 536; *Brown's App.*, 27 Pa. 62.

But it is unnecessary to rest the judgment in this case on grounds so technical. For I regard the residuary clause in the will as entirely decisive of this controversy, a view of the case which seems to have escaped the attention of either counsel.

The residuary clause is in these words: "And as to the rest and residue of my estate, if any, I give, devise and bequeath to my said three daughters in equal shares." And whatever doubt may have existed as to the estate of these three devisees in this lot of ground, under the prior gift in the will, is entirely removed by this clause. If, as contended by defendant's counsel, the prior gift only vested in the daughters and devisees a life estate in this lot, with a power of disposal in the survivor, then there remained a residue thereof, undisposed of, to wit, the reversion after the expiration of the life estate, if the power should remain unexecuted, and this was clearly given to the three daughters by this residuary clause; and it cannot be successfully contended that that clause only referred to the estate of the testatrix other than what had been previously mentioned: *Brown v. Boyd*, 9 W. & S. 123, 129; *Harper v. Blean*, 3 W. 473. In the latter case says Justice SERGEANT, in language peculiarly applicable to this case, "That the last devising clause was thrown in for the express purpose of comprehending every thing which he might have previously omitted, and with the design of making his wife universal legatee and

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devisee of all that he owned or possessed, I think is apparent; and in the construction of wills, the intent of the testator is to be carried into effect, if no rule of law be thereby infringed. It is objected that by the bequest of whatsoever was not named that he had any right to, either in law or equity, only things ejusdem generis as those previously mentioned passed, and that this clause cannot be extended to real estate. But artificial rules for the interpretation of deeds, contracts and other deliberate instruments, are not applicable to the construction of wills. On the contrary, many constructions have been given to words in a will to effectuate the intention of the testator, which would not have been permitted in a deed, and the same words have received different constructions. In modern times words not appropriate to real estate such as property, interest, effects and even legacy, have been adjudged sufficient." It will be observed that the language of the residuary clause of Mrs. Ahl's will is at least as apt to pass real estate as those held sufficient in the above case.

Applying the principles of this and the other above cited cases to the case in hand, it follows that whatever interest or estate in this particular lot of ground, however contingent or remote, did not pass by the first gift in the will of Mary Ahl to the three devisees therein named, must have passed to them by the residuary clause; that the fee vested in them at and immediately after the death of the testator; and by the death of the daughter, Mary, her share descended under the terms of the will to her sisters Catharine and Louisa, whose conveyance to the plaintiff was effectual to invest the fee in her. As that deed contains no reference to the power of disposal given by the will, it cannot be construed to have been made in execution of the power, for when one has both a power to sell and an interest in land, and makes a conveyance without reference to the power, it shall be deemed and taken that the land passed by virtue of his ownership, and not in execution of the power: *Hay v. Mayer*, 8 W. 203; and hence the question of the premature execution of the power does not arise.

To recapitulate: It is probable that by the first gift in this will, this lot of ground passed to the three devisees for their joint lives, with remainder in fee to the survivor; for "the power to dispose by will or otherwise," even if coupled with

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the gift of a limited estate, being the highest badge of ownership, would give the survivor a fee. But the construction must be placed upon the whole will. There is manifest a paramount intention of the testatrix to give her three daughters her whole estate, and by the residuary clause, she effectuates that intention by words sufficient to carry real estate in fee. It follows that the fee vested in the three devisees, subject to survivorship, and must finally and completely vest in one of the two now living. Their deed in fee simple to this plaintiff, is conclusively presumed to have been made in virtue of their ownership, and not in execution of the power of disposal granted in the will, and it conveyed to the plaintiff a fee simple in the lot of ground in controversy.

And now to wit, March 20, 1889, judgment in the case stated for the plaintiff for one hundred dollars with costs of suit.

Thereupon the defendant took this writ, assigning for error the entry of judgment for the plaintiff on the case stated.

Mr. V. K. Keesey and *Mr. W. F. Bay Stewart* (with them *Mr. Niles* and *Mr. Neff*), for the plaintiff in error.

Mr. Smyser Williams (with him *Mr. Cochran*), for the defendant in error.

PER CURIAM:

In view of the facts presented in the case stated, we are of opinion that the deed of Louisa and Catharine Ahl, surviving devisees of their mother Mary Ahl, to Ellen G. Bentz, the plaintiff below, for the real estate in question, vested in the latter a good title thereto in fee simple, and that the deed tendered by her to defendant below is sufficient to vest in him a good title in fee simple to same real estate. It therefore follows that the learned judge of the Common Pleas was right in entering judgment on the case stated in favor of the plaintiff below. The assignment of error is not sustained.

Judgment affirmed.

D. R. McCORMICK v. HANNAH McELLOGOTT.

ERROR TO THE COURT OF COMMON PLEAS OF LANCASTER
COUNTY.

27	230
34 SC	217
34 SC	218

Argued May 24, 1889—Decided June 7, 1889.

- (a) A testator, after giving all his estate to his wife for life and creating a trust as to \$5,000 to take effect after her death in favor of his son for life, devised and bequeathed the "rest, residue and remainder" of his estate, after the death of his widow, to his "daughter Hannah, her heirs and assigns," but providing that in case his "said daughter Hannah, should die without child or children," his estate should be equally divided between his brother and sisters.
1. In such case, the words "should die without child or children," were intended to mean, die without child or children during the lifetime of the testator's widow, and the daughter, Hannah, upon the death of the widow, became seized of an indefeasible estate in fee simple in the property so devised to her.

Before STERRETT, CLARK, WILLIAMS, MCCOLLUM and MITCHELL, JJ.

No. 348 January Term 1889, Sup. Ct.; court below, No. 3 January Term 1889, C. P.

On December 8, 1888, a case stated was filed wherein Hannah McElligott was plaintiff, and D. R. McCormick was defendant. The facts presented were as follows:

Jeremiah McElligott, of the city of Lancaster, died on November 11, 1875, leaving to survive him a widow, Anna McElligott, and two children, Hannah McElligott, the plaintiff above named, and Thomas F. McElligott, and also a brother, Daniel McElligott, and two sisters, Honora McElroy and Mary Studdard, after having made his last will and testament, bearing date August 17, 1875, duly proven, wherein and whereby he devised and bequeathed, inter alia, as follows, to wit:

"First. I direct all my just debts and funeral expenses to be paid and satisfied by my executrix hereinafter named, as soon as conveniently may be after my decease.

"Item. I give, devise and bequeath unto my beloved wife

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Anna, for and during her natural life, all my property, real, personal and mixed, of what nature and kind soever and where-soever the same shall be at the time of my death.

"Item. After the death of my wife Anna, I give and bequeath unto my friend Daniel A. Altick, five thousand dollars in trust, the interest thereof annually to be paid to my son Thomas for and during his natural life.

"Item. After the death of my son Thomas, it is my will, and I direct the said sum of five thousand dollars to remain in the hands of said Daniel A. Altick until the child or children of Thomas shall arrive at the age of twenty-one years, when the same shall be equally divided among such child or children; and in case the child or children of my said son Thomas shall die before arriving at the age of twenty-one years, then, and in that case, I order and direct that the said sum of five thousand dollars be paid to my daughter Hannah, or her heirs and assigns.

"Item. The rest, residue and remainder of my estate, real, personal and mixed, after the death of my said wife Anna, I give, devise and bequeath to my said daughter Hannah, her heirs and assigns.

"Item. In case my said daughter Hannah should die without child or children, then it is my will, and I order and direct that my estate be equally divided between my brother, Daniel McElligott, of the city of Lancaster, and my sisters, Honora McElroy, wife of Peter McElroy, of the city of Brooklyn, in the State of New York, and Mary Studdard, wife of John Studdard, of the city of St. Louis, in the State of Missouri, and their heirs and assigns, share and share alike."

Anna McElligott, the widow, died in the year 1882. The daughter, Hannah McElligott, on December 7, 1888, entered into articles of agreement with the said D. R. McCormick for the sale of a portion of the real estate, being a lot of ground situate on the east side of Water street (No. 47), in the city of Lancaster, ... and in said articles the said Hannah McElligott did covenant and agree to make, execute and deliver to the said D. R. McCormick a good and sufficient deed for the proper conveying and assuring of the above-described premises, in fee simple, and free from all incumbrance.

* * * * *

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If the court be of opinion that the said Hannah McElligott is so seized of the above-described premises, as that she can convey an indefeasible title, in fee simple, in execution of said agreement to the said D. R. McCormick, his heirs and assigns, free and discharged of all trusts of any kind, then judgment to be entered for the plaintiff for the sum of nine hundred dollars, with stay of execution to April 1, 1889; but if not, then judgment to be entered for the defendant.

The costs of this suit in either event, it is agreed, shall follow the judgment, and both parties reserve the right to sue out a writ of error.

On January 19, 1889, the court, LIVINGSTON, P. J., filed an opinion wherein, after discussing the different provisions of the will, and citing and considering Smith's App., 23 Pa. 9; Mander-son v. Lukens, 23 Pa. 31; Rewalt v. Ulrich, 23 Pa. 388; Letchworth's App., 30 Pa. 175; Burd v. Burd, 40 Pa. 182; Wom-rath v. McCormick, 51 Pa. 504; Fahrney v. Holsinger, 65 Pa. 388; Braden v. Cannon, 1 Gr. 60; Middleswarth v. Blackmore, 74 Pa. 414; Caldwell v. Skilton, 13 Pa. 152; Biddle's Est., 28 Pa. 59; Fulton v. Fulton, 2 Gr. 28; Mickley's App., 92 Pa. 514; Fitzwater's App., 94 Pa. 141; Lewin v. Killey, L. R. 13 App. C. 783, the court concluded:

In the will before us, Hannah McElligott was the daughter, the only daughter of the testator, and therefore, by nature, as well as first taker, the principal object of his bounty. He de-vises her an absolute estate, and to us it appears that he did not intend she should have a less or restricted estate in case she was living at the death of his wife, who had a life interest in it, the time when the devise to her would become operative. There is no unequivocal intent shown in the will, that he meant that she should take a less estate, but rather that there should be no restriction, for, on the happening of a certain contingency, he gives her absolutely the \$5,000 set apart in trust for his son.

The law favoring an absolute, rather than a defeasible estate, a vested rather than a contingent estate, we are of opinion that the proper construction of the will before us is, that the testator meant and intended that his daughter Hannah should take and have an absolute estate in fee simple in the property

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devised to her, provided she was living at the time of the decease of his wife, the first taker, to whom he had given a life interest therein. And, that having been alive at the death of the widow, the termination of the particular or life estate, she took and now holds an absolute estate in fee simple in the property devised to her, and, having and holding such absolute and indefeasible title, being so seized in the premises described in the contract or agreement made part of this case stated, she can convey the same in fee simple, free and discharged from all apparent trusts, or trusts contained in the will of the testator, or elsewhere.

And we, therefore, in pursuance of the requirements of the case stated, now enter judgment for the plaintiff for the sum of \$900 with stay of execution until April 1, 1889.

The defendant thereupon took this writ, specifying that the court erred :

1. In deciding that Hannah McElligott took an absolute indefeasible estate in fee simple, under the will of her father.
2. In not deciding that there was an executory devise over, in case Hannah should die without child or children.
4. In entering judgment for the plaintiff on the case stated.

Mr. Wm. R. Brinton, for the plaintiff in error.

Mr. Atlee and *Mr. Coyle*, for the defendant in error, were not heard.

PER CURIAM:

Notwithstanding the able and ingenious argument of the learned counsel for plaintiff in error, we are not convinced that the will of Jeremiah McElligott was erroneously construed by the court below.

After giving all his estate, real, personal and mixed, to his wife for life, and creating a trust, as to \$5,000, to take effect at her death, in favor of his son Thomas, for life, etc., the testator devised and bequeathed "the rest, residue and remainder" of his estate remaining after the death of his widow to his "daughter Hannah, her heirs and assigns." In the next clause of the will, he orders and directs, in case his "said daughter

Syllabus.

Hannah should die without child or children," that his estate be equally divided between his brother and sisters. The devisee, Hannah McElligott, having come into possession of the residuary estate after the death of her mother, contracted to sell and convey a portion thereof in fee to defendant below. She accordingly executed and tendered him a deed, in due form, for the lot referred to in the case stated, but he refused to accept it and pay the consideration money, on the ground that under the provisions of the will she was not seized of an indefeasible estate of inheritance and was therefore unable to convey such title as he had a right to demand. The learned judge of the Common Pleas, however, held that the testator intended to give his daughter Hannah an absolute estate in fee simple in the property devised to her, provided she survived her mother, to whom he had given a life estate therein; that being so seized of an indefeasible estate, her deed to defendant below, would, under the facts embodied in the case stated, give him a good title in fee, clear of all incumbrances; and he therefore entered judgment, on the case stated, in her favor. In this we think he was clearly right, for reasons given at length in his opinion sent up with the record. The words "should die without child or children," were evidently intended to mean, die without child or children during the lifetime of testator's widow. This construction accords with the weight of authority. Neither of the specifications of error is sustained.

Judgment affirmed.

J. O'FERRALL & CO. v. S. MOORE ET AL.

ERROR TO THE COURT OF COMMON PLEAS OF LANCASTER
COUNTY.

Argued May 24, 1889—Decided June 7, 1889.

If, upon the trial of an appeal from the judgment of a justice of the peace, the cause is tried upon its merits, without regard to the amount of the plaintiff's claim or of the defendant's set-off, it is too late, when all the testimony is before the jury, for the plaintiff to ask to have the

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defendant's evidence of set-off withdrawn from the jury, on the ground that its amount exceeds the jurisdiction of the justice.

Before STERRETT, CLARK, WILLIAMS, MCCOLLUM and MITCHELL, JJ.

No. 358 January Term 1889, Sup. Ct.; court below, No. 22 May Term 1887, C. P.

On April 1, 1887, John O'Ferrall, trading as John O'Ferrall & Co., obtained judgment before a magistrate against Samuel Moore and Eugene M. Haines, for \$293.92, from which judgment the defendants took an appeal. In the Court of Common Pleas the plaintiff, on April 23, 1887, declared on a note for \$400, dated September 7, 1886, with the common counts. At the foot of the narr was the memorandum: "\$400 less \$114.29," and the following statement in addition:

" Amount of plaintiff's demand	\$285.71
Cost of protest, etc.,	2.51
Interest from December 9, 1886	_____

On the same day the plaintiff filed an affidavit of claim setting out a copy of the note with a credit indorsed of \$114.29, and claiming a balance of \$285.71, with interest from December 9, 1886, and \$2.51 costs of protest.

The defendants pleaded, non-assumpsit, payment, payment with leave and set-off.

At the trial on February 8, 1888, before LIVINGSTON, P. J., the plaintiff put in evidence the note with its indorsement and rested.

The defendants showed that the note was given in part payment for fruit cans which defendant Moore had purchased from the plaintiff, and offered evidence to the effect that Moore had suffered damage by reason of the defective character of the cans furnished, loss on fruit, delay, overcharges, etc., and as to cash paid by defendants in excess of the credits allowed. When footed up the items of damage and credit claimed by the defendants, upon the evidence, aggregated \$442.81.

The plaintiff adduced testimony in rebuttal of defendants' case, and when the case was closed on the evidence, "Mr. Hensel, on behalf of plaintiff, requested the court to withdraw from the jury all evidence offered by the defence in support of

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a set-off, as the total amount of set-off exceeded \$800, a sum beyond the jurisdiction of the justice of the peace from whom this case comes into this court on an appeal; and to instruct the jury to find a verdict for the plaintiff for the full amount of his claim."

The court declined to withdraw the testimony of set-off from the jury, and to instruct the jury as requested by plaintiff's counsel. Exception to plaintiff.

While the case was with the jury, by leave of the court, the plaintiff amended his narr by declaring for \$285.63, instead of \$400.

The jury returned a verdict in favor of the plaintiff for \$22.63. A rule for a new trial having been discharged, by opinion filed, LIVINGSTON, P. J., the plaintiff took this writ, specifying that the court erred:

1. In not withdrawing from the jury all evidence offered by the defence in support of a set-off after it appeared that the total amount of set-off claimed exceeded three hundred dollars.

2. In not withdrawing from the jury all evidence offered by the defendants except so much as related to payment and overcharges.

3. In not giving binding instructions for the plaintiff for his whole claim, except so much as was shown to have been paid or to have been based on overcharges.

4. In not giving binding instructions for the plaintiff for the full amount of his claim.

Mr. W. U. Hensel (with him *Mr. Brown*), for the plaintiff in error.

Mr. Marriott Brosius, for the defendants in error.

PER CURIAM:

It appears from an examination of the testimony, returned with the record, that this case was tried on its merits without regard either to the extent of the plaintiff's claim, or the aggregate amount and nature of the items presented by defendants under their pleas of "non-assumpsit, payment, payment with leave and set-off." No points for charge were presented in writing by either side, but, when the case was about being

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submitted to the jury, the court was verbally requested by plaintiff's counsel, to withdraw all the evidence introduced by defendants in support of their plea of set-off, because the items of set-off aggregated more than \$300, the limit of the justice's jurisdiction, and to instruct the jury to find for plaintiff the full amount of his claim. The refusal of the court to withdraw the evidence and instruct the jury as requested, is the subject of complaint in the several specifications of error.

In his opinion refusing a new trial, the learned judge, referring to the manner in which the case was tried, says: "When objection was about being made to the admission of defendant's testimony as to set-off, because it was apparent the amount of set-off claimed would exceed the jurisdiction of a justice of the peace and could not have been admitted by the justice, we very plainly intimated to counsel that if the justice had not jurisdiction of defendant's set-off, neither had he of plaintiff's claim as shown by the narr and pleadings in the case, as both in amount exceeded the jurisdiction of a justice of the peace, and that it would probably be best to dismiss the case for that reason; but, neither party desired that this should be done. Both appeared desirous of proceeding with and disposing of the case on its merits. The objection was not pressed nor entered and the case was proceeded with on its merits, as if originally brought in this court. The whole dealings and accounts between the parties were fully and fairly laid before the jury. The plaintiff, without objection on the part of the defendants, took his chance of obtaining a verdict, and did obtain a verdict for \$22.63."

In view of what clearly appears to be the fact, that technical objections were waived and by mutual consent the case was tried upon its merits as though the suit had been originally brought in court, it was too late, after all the testimony was before the jury without any exception to its admission, to ask the court to strike out the evidence on which defendants mainly relied, and to direct a verdict in favor of plaintiff. Under the circumstances, the court was clearly right in refusing to do either. The assignments of error are not sustained.

Judgment affirmed.

JOHN FEAGLEY v. J. H. NORBECK ET AL.

ERROR TO THE COURT OF COMMON PLEAS OF LANCASTER
COUNTY.

Argued May 24, 1889—Decided June 7, 1889.

1. An order setting aside an execution is in the nature of a final judgment, and a writ of error will lie thereto.
2. Where, at the time a bond with warrant of attorney to enter judgment is executed, the obligee agrees in writing not to issue execution except on a specified contingency, it is not error to set aside an execution issued in violation of the agreement.
3. The record showed that depositions had been filed to be read at the hearing of the rule to set aside the execution, but they were not furnished to the Supreme Court: In such case the finding of the court below, that the writ was issued in violation of the agreement, will be taken as correct.

Before STERRETT, CLARK, WILLIAMS, MCCOLLUM and MITCHELL, JJ.

No. 285 January Term 1889, Sup. Ct.; court below, No. 8 January Term 1889, E. D., C. P.

On November 28, 1888, a rule was granted to show cause why an alias fieri facias issued by John Feagley against Jacob H. Norbeck and Jacob Miley, trading as Norbeck & Miley, to No. 8 January Term 1889, E. D., should not be set aside. At the same time, another rule was granted to show cause why the judgment upon which the alias fieri facias was founded, should not be opened for the purpose of ascertaining the amount due thereon.

The facts sufficiently appear in the opinion of the court, PATTERSON, J., filed December 21, 1888.

Briefly stating the facts of the controversy, for the urgency of an early decision prevents an extended review of all the incidents arising between the contending parties, the firm of Norbeck & Miley, engaged in the business of carriage building, etc., in the city of Lancaster, desiring large means or capital

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for that purpose, gave a bond, with power to enter judgment, to the plaintiff, John Feagley, dated January 5, 1887, conditioned to pay \$10,000 one day after the date thereof, and reciting: "This judgment is given as collateral security to secure the said John Feagley for all liability he has now incurred, or may hereafter incur, for us, either as individuals or as partners, by reason of any and all indorsements, or as surety on any or all obligations on which he is at present or may hereafter become bound on our account;" which judgment bond was entered in the prothonotary's office at Lancaster the same day.

Agreeably to the object and conditions of said bond, the parties, plaintiff and defendants, in said bond, mutually supported each other, indorsing notes and renewing the same, by which the obligors carried on their business, apparently successfully, and gradually reduced their liability to the obligee in said bond, until, as it seems, by a loss of mutual confidence, the obligee in the bond, on November 19, 1888, issued an execution for a real debt of \$5,000, and the same was levied upon the personal property of the obligors. In this state of things the parties and their counsel had a mutual conference on November 21st, in which it was agreed that the plaintiff would stay the writ of execution. The execution was accordingly stayed on November 21, 1888, by being so marked on the writ and signed by the plaintiff's attorney, the defendant or his attorney paying the costs, and was so returned by the sheriff. On the evening of the same day, to wit, November 21, 1888, the plaintiff issued an alias execution on same judgment for a real debt of \$5,000, and on the 23d of same month the sheriff made a levy, as in the former writ of execution, whereby the business and business place of the defendants was closed and put into the hands of the sheriff. It was then that the defendant, Jacob H. Norbeck, the successor of the firm of Norbeck & Miley, presented his petition to the court, and on November 23, 1888, obtained the above rule to show cause, to wit, to strike off said alias fieri facias, and to open said judgment for the purpose of ascertaining how much, if anything, was due on the same. And on December 3, 1888, Norbeck, the defendant, supplemented his petition for said rule, and filed it same day in court. Both the said executions were issued to the same term.

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When the mutual arrangement was made to withdraw the first execution, it appears that verbally some certain conditions were agreed upon, one of which was that the defendant, Norbeck, would pay \$500 on a note in the Lancaster County Bank then due. This is not denied by the defendant, but he answers that he had made arrangements to pay the \$500 above mentioned, but was prevented from complying with his agreement in that particular by reason of the plaintiff, in violation of his agreement, having issued an alias fieri facias on the same judgment a few hours after the settlement and withdrawal of the first fieri facias, as before stated, thereby putting his real and personal property in the custody and control of the sheriff.

Other alleged verbal conditions made at the withdrawal of the first fieri facias are asserted by one party and denied by the other. The court cannot consider such.

The parties also disagree as to the amount now due on the said collateral judgment; that is, the amount which the plaintiff, Mr. Feagley, is liable for, and the court cannot see how the making of the rule to open the said judgment absolutely can be denied.

That being the condition of things, when the alias fieri facias issued, and as it issued for too much, and the data given the court, as to the amount due not being mutually agreed to, the court could not correct the fieri facias as to amount. It will be necessary, therefore, that an issue be ordered to ascertain the correct indebtedness of defendants to the plaintiff under the said judgment. The plaintiff cannot complain of such action. When the collateral judgment of \$10,000 was given and entered up in the prothonotary's office on January 5, 1888, although another judgment held by a different party preceded it, the plaintiff in this judgment was willing to take the second place and apparently considered himself perfectly safe on the real estate of the defendants. On the same day defendants executed the judgment bond for \$10,000 to secure the plaintiff, the plaintiff in writing agreed as follows:

"Whereas, Jacob H. Norbeck and Jacob Miley have executed this day a judgment as collateral security to John Feagley to secure him against all liability as indorser or surety for the said Norbeck & Miley, payable one day after date; now it is agreed that for and in consideration of one dollar that the said

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John Feagley will not issue execution upon said judgment unless it should become necessary by reason of delay, or on account of judgment being about to be obtained and execution issued by some other party against the said Norbeck & Miley.

[Signed] JOHN FEAGLEY."

It is not alleged that a judgment was about to be obtained or execution issued by some other person or party: mere rumor that defendant was about to make an assignment, nothing more.

The real estate of defendants will still be bound, and at this date the evident liability of the plaintiff, Feagley, is comparatively small. The court is without data to correct the amount in the fieri facias, or they would do so on motion. For the law is that the court has control of the writs of execution, so as to do justice to the parties, and we are of the opinion that that will be done by setting aside this alias fieri facias and opening the judgment to let the defendant into a defence and the plaintiff to show how much, if anything, is still due on the same.

The rule or rules considered are made absolute, on condition that defendant pay the \$500 referred to in this opinion that he had agreed to pay, and the sheriff then shall withdraw from the goods his levy.

The plaintiff thereupon took this writ, specifying that the court erred in making absolute the rule to show cause why the alias fieri facias No. 8 January Term 1889, should not be set aside.

Mr. William Leaman (with him *Mr. Houser*), for the plaintiff in error.

Counsel cited, as to the power of the court over process of execution, and when it should or should not be exercised: *Patterson v. Patterson*, 27 Pa. 40; as to the right to an alias writ to the same term, when the original had first been stayed: *Shaffer v. Watkins*, 7 W. & S. 219; *Ingham v. Snyder*, 1 Wh. 116; *Potts's App.*, 20 Pa. 253; *Missimer v. Ebersole*, 87 Pa. 109; *Springer v. Brown*, 9 Pa. 305; *Bole v. Bogardis*, 86 Pa. 37; *Gibbs v. Atkinson*, 1 Clark 476; *Commonwealth v. Stremback*, 3 R. 344; *Miner v. Walter*, 8 Phila. 571.

Mr. W. H. Roland and *Mr. J. Hay Brown*, for the defendants in error:

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1. The opening of the judgment set aside the *alias fieri facias*: *Savage v. Kelly*, 11 Phila. 525; and a writ of error does not lie to the order making absolute the rule to open the judgment; the remedy is by appeal: Act of April 4, 1877, P. L. 58; T. & H. Pr. § 809, n. 10; *Compher v. Anawalt*, 2 W. 490; *Skidmore v. Bradford*, 4 Pa. 296; *McKee v. Sanford*, 25 Pa. 105; *Henry v. Brothers*, 48 Pa. 70; *Peoples F. Ins. Co. v. Hartshorne*, 84 Pa. 453. Moreover, there being no final judgment here, the writ of error was premature: *Citizens B. & L. A. v. Hoagland*, 87 Pa. 326.

2. The opening of a judgment entered upon warrant of attorney is a matter of sound discretion, and when that discretion is properly exercised, it is not reviewable: *Bunce v. Wightman*, 29 Pa. 335; *Kellogg v. Krauser*, 14 S. & R. 137; *Hutchinson v. Ledlie*, 36 Pa. 112; *Banning v. Taylor*, 24 Pa. 289; *Cochran v. Eldridge*, 49 Pa. 365; and the court will take notice of binding agreements, given at the time the judgment was executed and will set aside an execution issued in violation thereon. Moreover two successive writs cannot be issued returnable to the same term: T. & H. Pr., § 974; if it be done, the *alias writ* will be set aside; *Shaffer v. Watkins*, 7 W. & S. 219; *Potts's App.*, 20 Pa. 253; *Missimer v. Ebersole*, 87 Pa. 109.

OPINION, MR. JUSTICE STERRETT:

The subject of complaint in the only assignment of error on this record is the order of court setting aside the *alias fieri facias*, No. 8 of January Term 1889.

It is claimed that the only remedy the plaintiff had was an appeal under the act of April 4, 1877, P. L. 52; but that is a mistake. The act referred to provides for an appeal to this court by parties aggrieved by the action of court on applications to open judgments entered by warrant of attorney, etc. A writ of error is the proper remedy for such action of the court as is here complained of. The court below had before it at the same time two distinct rules, one to open the judgment, and the other to set aside the *alias fieri facias*. Both were made absolute, but no appeal having been taken from the former, it is not before us. The latter, however, is properly here on the writ of error. An order setting aside an execu-

Opinion of the Court.

tion is in the nature of a final judgment, to which a writ of error lies: *Pontius v. Nesbit*, 40 Pa. 309.

The only remaining question is whether there was anything to warrant the action complained of. The court appears to have found as a fact that the execution was issued in direct violation of an express agreement not to do so, except in a certain contingency which had not then happened. The agreement is in writing, signed by the plaintiff at the time he received from defendants the bond on which the judgment above referred to was entered; and, as recited in the opinion of the court below, reads as follows: "Whereas, Jacob H. Norbeck and Jacob Miley have executed this day a judgment as collateral security to John Feagley to secure him against all liability as indorser or surety for the said Norbeck & Miley, payable one day after date; now it is agreed, that for and in consideration of one dollar that the said John Feagley will not issue execution upon said judgment, unless it should become necessary by reason of delay, or on account of judgment being about to be obtained and execution issued by some other party against the said Norbeck & Miley. JOHN FEAGLEY."

As above stated, the court found that the execution in question was issued in violation of the agreement. The plaintiff has failed to satisfy us that there was any error in that conclusion. The docket entries show that depositions were taken, to be used on hearing of the rules, but we have not been furnished with them. In the absence of anything to the contrary, we must assume that the finding of the learned judge is correct. If so, the execution was rightly set aside.

Order of court setting aside alias fieri facias is affirmed, with costs to be paid by plaintiff.

127	244
202	570

JACOB D. HEFT v. FRANK E. OGLE, ADMR.

ERROR TO THE COURT OF COMMON PLEAS NO. 1 OF PHILADELPHIA COUNTY.

Argued January 10, 1888—Decided June 28, 1889.

[To be reported.]

In an action by an executor or administrator based on a claim in favor of the estate, a legatee or distributee, who has parted with his interest either by release, payment or assignment, is a competent witness for the plaintiff, unless there is some other ground of exclusion than the fact that he is a legatee or distributee.

Before GORDON, C. J., PAXSON, STERRETT, GREEN, CLARK and WILLIAMS, JJ.

No. 428 January Term 1887, Sup. Ct.; court below, No. 486 September Term 1884, C. P. No. 1.

On September 20, 1884, Frank E. Ogle, administrator of Mary F. Ogle, deceased, brought assumpsit against Jacob D. Heft, surviving partner of Jacob D. Heft and Harry S. Ogle, trading as Heft & Ogle, to recover the sum of \$5,000 alleged to have been loaned by the decedent to the firm of Heft & Ogle on May 2, 1873, less the sum of \$45 paid on September 25, 1878, on account of the interest. The defendant pleaded, non-assumpsit, payment, payment with leave, set-off, and the statute of limitations.

At the trial on February 9, 1887, before BIDDLE, J., it was made to appear that Mary F. Ogle, the plaintiff's intestate, died in July, 1876, leaving to survive her four children, Maria S., Harry S., Frank E. and Caroline Ogle. Harry S. Ogle was a member of the firm of Heft & Ogle, and had died after the death of his mother. Letters of administration upon his mother's estate were granted to Frank E. Ogle.

Plaintiff called Maria S. Ogle as a witness to prove the loan. Being a daughter of the decedent, her competency as a witness was objected to, when there was produced the following paper:

Arguments.

"Know all men by these presents, that I, Maria S. Ogle, do hereby for myself, my heirs, executors, and administrators, absolutely release, assign, transfer, and discharge unto Frank E. Ogle all my right, title, and interest of whatsoever kind, either in law or equity, of, in and to any sum or sums of money which may be recovered in or which may result from the action of Frank E. Ogle, administrator, against Jacob D. Heft, surviving partner, now pending in the Court of Common Pleas No. 1, of September Term 1884, No. 486, and do discharge him from any liability or accountability to me in any form whatever, for any sum or sums of money which may be recovered in said action.

"Witness my hand and seal the twentieth day of September, A. D. 1884.

[Signed] MARIA S. OGLE. [L. S.] "

The witness testified that there was no other agreement between herself and her brother than the writing produced, and that she had then no interest in the moneys sought to be recovered.

The objection being renewed, it was overruled and the witness admitted to testify, generally; exception.¹

The defendant, to show that no money had been loaned by the decedent to the firm, but that her son, Harry S., had had the book-keeper place to her credit \$4,850 which the firm had borrowed from one Hartley Shoesmith and had repaid to him, offered in evidence a check for \$1,000, dated July 9, 1879, drawn by Heft & Ogle, to the order of and indorsed by Shoesmith, as proof of repayment of part of such loan.

Objected to; offer refused; exception.²

The jury returned a verdict in favor of the plaintiff for \$9,115.88. A rule for a new trial having been discharged, the defendant took this writ, assigning for error:

1. The admission of plaintiff's offer.¹
2. The refusal of the defendant's offer.²

Mr. George Junkin (with him *Mr. Joseph De F. Junkin*), for the plaintiff in error:

Certainly Maria S. Ogle was interested in the result of the suit, prior to the execution of the paper in evidence. Did its execution render her competent?

Arguments.

1. This being a suit by an administrator of a decedent, to recover an alleged loan made to the defendant firm in her lifetime, the act of 1869 does not apply, and the competency of the witness must be decided as if that law had not been enacted: *Hoopes v. Beale*, 90 Pa. 82. Had the witness simply released her interest in the sum sought to be recovered, to the administrator, beyond all doubt she would have been made competent; for a distributee cannot be forced to accept a share of the decedent's estate. But when a distributee not only does not decline but actually accepts the share, and then makes an assignment or sale of it, either colorable or for value, and then is offered as a witness to support the claim, the law rejects such a witness: *Post v. Avery*, 5 W. & S. 509; *Leiper v. Peirce*, 6 W. & S. 555; *Patterson v. Reed*, 7 W. & S. 146; *McClelland v. Mahon*, 1 Pa. 364; *Clover v. Painter*, 2 Pa. 46; *Asay v. Hoover*, 5 Pa. 21; *Montgomery v. Grant*, 57 Pa. 243; *Grayson's App.*, 5 Pa. 395; *Graves v. Griffin*, 19 Pa. 176; *Bailey v. Knapp*, 19 Pa. 192; *Lindsley v. Malone*, 23 Pa. 24; *Hatz v. Snyder*, 26 Pa. 511.

2. It may be claimed that in this case the interest is collateral, and not direct, and that that should make a difference. Why should it? In *Asay v. Hoover*, 5 Pa. 21, which was a contest relating to land the ownership of which was cast upon the heir, the court held that the witness could not assign his interest and then come in and swear his title through. Suppose it had been a distributive share or a legacy, cast upon him or given to him by will, does the fact that he must get it through the personal representative interfere with his interest or with the reasons of public policy which will exclude him? *Haus v. Palmer*, 21 Pa. 297, was a feigned issue. Mary Norman, a legatee, assigned her legacy to her mother, and was admitted as a witness. But this court held her incompetent. So in *Hitner's App.*, 54 Pa. 110, the widow of a decedent executed an assignment of her interest in the estate to her son. She was rejected as a witness by the court below, and the rejection was affirmed. The law of *Post v. Avery*, *Haus v. Palmer* and *Hitner's Appeal*, is the true law of this state. A legatee or distributee may decline to accept the share or legacy, and by executing a release to the estate become a competent witness; but he cannot accept and then assign, for a valuable

Arguments.

or other consideration, and then come in to support the sale or assignment by his oath.

Mr. A. T. Freedley and Mr. Wm. Henry Rawle, for the defendant in error:

1. It is well settled, that in actions by or against executors or administrators, a party to the record, or the assignor of the claim sued upon, cannot testify, even if he have assigned or released his interest; nor can one who, although not nominally, is yet substantially a party to the record, as in cases of legatees or distributees in feigned issues, or in matters involving the settlement of the estate. But, on the other hand, it is equally well settled that in an action by an administrator against a third person, a legatee or distributee who has parted with his interest is a competent witness. And it is immaterial whether such interest has ceased by assignment, by transfer, by payment, or by release, for when the interest from whatever cause ceases, the disqualification ceases: *Dellone v. Rehmer*, 4 W. 9; *Steininger v. Hoch*, 42 Pa. 432; *Forrester v. Torrence*, 64 Pa. 31; 1 Greenl. Ev., § 430; *Miller on Witnesses*, 58.

2. The witness was not the plaintiff in the action, nor could she ever have been; nor was she the assignor of the claim sued upon; hence she did not first raise the claim and then support it by her testimony. Her interest, apart from the assignment, was wholly a collateral interest in the sum which might be recovered; and it has always been the law that when such interest was divested by assignment or any other species of transfer, the witness thereby became competent. Thus in *Commonwealth v. Ohio & P. R. Co.*, 1 Gr. 348, *BLACK, J.*, said: "When the interest of the witness is collateral, his competency may be restored by a release or a transfer of it. The rule in *Post v. Avery*, applies only to persons who have assigned choses in action, on which the recovery should have been for their own use, if no assignment had been made. . . . The rule in question is not leveled against interested witnesses, but is founded in the policy of stopping a disinterested party from testifying in favor of one who sues in his right." See also, *Cornell v. Vanartsdalen*, 4 Pa. 364.

3. The cases which are cited against the position taken fall within one of three heads, to wit: (a) Where the proffered

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witness was actually a party to the record, as in *Post v. Avery*, 5 W. & S. 509; *Leiper v. Peirce*, 6 W. & S. 555; *Patterson v. Reed*, 7 W. & S. 146; *McClelland v. Mahon*, 1 Pa. 364; *Clover v. Painter*, 2 Pa. 46. (b) Where the proffered witness, although not nominally was yet substantially a party to the record, as in feigned issues and litigations winding up the settlement of estates: *Haus v. Palmer*, 21 Pa. 297; *Asay v. Hoover*, 5 Pa. 21; *Montgomery v. Grant*, 57 Pa. 243; *Hitner's App.*, 54 Pa. 110; *Fross's App.*, 105 Pa. 266; *Hamburg Bank's App.*, 4 Cent. R. 921. (c) Where the proffered witness was the assignor of the thing in action, or a party to commercial paper: *Grayson's App.*, 5 Pa. 395; *Bailey v. Knapp*, 19 Pa. 193; *Lindsley v. Malone*, 23 Pa. 25; *Hatz v. Snyder*, 26 Pa. 511; *Fross's App.*, 105 Pa. 266.

OPINION, MR. JUSTICE STERRETT:

This suit was brought by Frank E. Ogle, administrator of Mary F. Ogle, deceased, against Jacob D. Heft, who survived Harry S. Ogle, late partners as Heft & Ogle, to recover money alleged to have been loaned to said firm by plaintiff's intestate, Mary F. Ogle, who died leaving, as her only heirs-at-law, four children, viz., Maria S., Harry S. (deceased member of Heft & Ogle), Frank E. (the administrator), and Caroline Ogle.

On the trial, plaintiff below called his sister, Maria S. Ogle, to substantiate the claim in suit. The witness being objected to as incompetent, he proved and put in evidence a paper, signed and sealed by her, wherein she absolutely releases, assigns and transfers to her brother, Frank E. Ogle, individually, all her "right, title, and interest of whatsoever kind, either in law or equity, of, in and to any sum or sums of money which may be recovered or which may result from" this suit, and discharges "him from all liability or accountability in any form whatever, for any sum or sums of money which may be recovered in said action." The witness also testified, on her voir dire, that there was no other agreement between herself and her brother, and that she then had no interest in the fund. The objection was overruled, and bill sealed for defendant below.

The question thus presented in the first specification is, whether the learned judge erred in ruling as he did. We are of opinion that he did not. The witness was not a party to

Opinion of the Court.

the record. She was neither the owner nor the assignor of the claim in suit; nor could she, individually, in her own right, ever have been plaintiff in an action to recover the same. She was not a party in interest, because, prior to suit brought, she absolutely released and transferred to her brother, individually, all the interest she ever had or could have in the amount that might be recovered. She was therefore competent to testify, and no policy of law excluded her. On the contrary, the policy of the law is rather to favor the admission of witnesses who are divested of all interest. Whenever it is practicable to do so, the tendency of modern legislation, as well as judicial decision, is to let questions of policy, interest, etc., go to the credibility, rather than to the competency of witnesses.

On principle as well as authority, it ought to be considered settled that in an action by an executor or administrator, based on a claim in favor of the estate he represents, a legatee or distributee who has parted with his interest, either by release, payment, or assignment, is a competent witness for plaintiff, unless there is some ground of exclusion other than the fact that he is a legatee or distributee, and as such was previously interested in the result of the suit: 1 Greenl. Ev., §§ 419, 430; Miller on Witnesses, 58; Scott v. Lloyd, 12 Pet. 145; Gebhart v. Shindle, 15 S. & R. 235; Dellone v. Rehmer, 4 W. 9; Commonwealth v. Ohio & P. R. Co., 1 Gr. 348; Cornell v. Vanartsdalen, 4 Pa. 364; Carter v. Trueman, 7 Pa. 315; Steininger v. Hoch, 42 Pa. 432; Forrester v. Torrence, 64 Pa. 29; Brant v. Dennison, 3 East'n R. 9; s. c., 1 Cent. R. 400.

In some of our cases there is more or less confusion of thought, arising from the failure to properly distinguish those of the class to which the one now before us belongs, from cases in which the proffered witness was either actually or substantially a party to the suit, or in which he was the assignor of the thing or contract in action, a party to a negotiable instrument, or otherwise incompetent on the ground of public policy. In Haus v. Palmer, 21 Pa. 296; Montgomery v. Grant, 57 Pa. 243; Grayson's App., 5 Pa. 395; Bailey v. Knapp, 19 Pa. 193; Hatz v. Snyder, 26 Pa. 511; Fross's App., 105 Pa. 258, 266, and kindred cases, witnesses were excluded for one or other of the reasons above stated. Some of those grounds of exclusion are now greatly restricted by legislation of comparatively recent date.

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In *Commonwealth v. Ohio & P. R. Co.*, supra, Mr. Justice BLACK notices the distinction between an interest that is collateral and one that is direct, as follows: "When the interest of the witness is collateral, his competency may be restored by a release or transfer of it. The rule in *Post v. Avery* applies only to persons who have assigned choses in action on which the recovery would have been for their own use, if no assignment had been made. Its object is to prevent a party from transforming himself into a witness by the magic of a bit of paper. It forbids one who assigns a claim to sell his oath along with it. But a person who has a merely incidental interest in the result, an interest which arises entirely out of the fact that the record may be evidence for or against him in some other action, may divest himself of such interest, and if he does so at any time before he is offered as a witness, his testimony must be received. For instance, a stockholder in a corporation may transfer his stock and become a witness for the company; a legatee may dispose of his interest in the estate and testify for the executors; an attorney who has a contingent fee may release it and give evidence in favor of his client. The rule in question is not leveled against interested witnesses, but is founded in the policy of stopping a disinterested party from testifying in favor of one who sues in his right."

Brant v. Dennison, supra, was an action of ejectment against a mortgagor by the administrators of the mortgagee who died intestate, unmarried and without issue. On the trial, a niece and heir-at-law of the intestate, and wife of one of the administrators, was called by them to sustain the mortgage on which the action was based. Being objected to as incompetent, because she was the wife of one of the plaintiffs and also a distributee of the estate represented in part by her husband, and therefore interested, it was shown that she had previously executed and delivered to a third party an assignment of all her interest in the mortgage in controversy; and on the authority of *Carter v. Trueman*, *Steininger v. Hoch*, and kindred cases, it was held that inasmuch as she was not a party to the suit, either actually or substantially, and her interest as distributee, so far as the claim in suit was concerned, having been divested by the assignment, she was a competent witness. In principle, that case is not essentially different from the one under consideration. The first specification of error is not sustained.

Statement of Facts.

There was no error in rejecting the offer of evidence recited in the second and last specification.

Judgment affirmed.

W. C. GAREY v. N. K. WOODWARD.ERROR TO THE COURT OF COMMON PLEAS OF SULLIVAN
COUNTY.

Argued March 18, 1889—Decided June 28, 1889.

(a) In an action of trespass for taking lumber, it appeared that the plaintiff's title to a larger lot of lumber had been determined by an action of replevin between plaintiff and same defendant, and there was evidence that the lumber taken, if not a part of the lumber replevied, was lumber to which the plaintiff had the same title, which fact was known to the defendant.

1. In such case, it was error to charge the jury that if the lumber taken was not part of the lumber replevied, "the title was not adjudicated in the replevin suit as against the defendant, and their verdict should be in his favor."

Before PAXSON, C. J., STERRETT, GREEN, CLARK and WILLIAMS, JJ.

No. 86 January Term 1888, Sup. Ct.; court below, No. 12 December Term 1883, C. P.

On October 12, 1883, W. C. Garey brought trespass against N. K. Woodward to recover the value of 11,941 feet of hemlock lumber alleged to have been taken and sold by the defendant.

At the trial on May 27, 1887, it was made to appear that in May, 1883, the plaintiff Garey had brought replevin against one O. A. Seeley for 60,500 feet of hemlock lumber at Dushore Switch, a shipping place. The defendant in the replevin declined to give a claim property bond, and the sheriff delivered the lumber into the hands of Garey. Afterwards, N. K. Woodward took and sold 11,941 feet of lumber which was a part of

Charge of Court below.

the lumber the subject of the replevin suit, as claimed by Garey, who then brought the present action. In the replevin case N. K. Woodward became a defendant and pleaded property in the disputed lumber in himself, and the case was so proceeded in, that a verdict and judgment were had for the plaintiff, Garey, the judgment being affirmed by the Supreme Court in *Seeley v. Garey*, 109 Pa. 301.

The record of the action of replevin was put in evidence and testimony adduced tending to sustain the plaintiff's contention that the 11,941 feet of lumber were a part of the 60,500 feet covered by the former judgment, or, if it was not part of it, that it had been manufactured from logs belonging to the plaintiff, had been taken by him to the same station, and had been claimed and cared for by him, of which facts the defendant had full knowledge. The defendant contended and adduced testimony to show that the lumber in controversy was not at Dushore Switch, and that it was not part of the replevied lumber.

The court, SITTSER, P. J., charged the jury in accordance with the answers to the following points presented:

The counsel for the plaintiff have requested us to say to you:

1. "That under the contract given in evidence in this case between O. A. Seeley and T. J. Jordan, the sawing timber upon the tracts of land therein mentioned became the property of Thomas J. Jordan so soon as the bark was peeled therefrom. And by the sale of the same by Thomas J. Jordan to W. C. Garey, then Garey became the owner of the same."

Answer: This we affirm, this part of it.

"And if the jury believe that the lumber in controversy was manufactured from this timber, then the plaintiff is entitled to recover the value of the same with interest."

Answer: This part of it we do not affirm; for as we have already explained to you there is no evidence in this case to show that N. K. Woodward was a trespasser upon any possession of the plaintiff, unless it is shown by the record in the replevin suit, and by transactions which occurred after he took the delivery of the lumber from Seeley at Dushore.⁵

3. "If the jury believe that the sheriff having a writ of re-

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plevin against O. A. Seeley went to the lumber in controversy taking possession of the same, and delivered said lumber to W. C. Garey, then their verdict must be for the plaintiff for the value of said lumber with interest."

Answer: This we affirm with this qualification: that if this was the property of Garey, and the sheriff actually took possession of the lumber and turned it over to Garey, and Garey took possession of it, then if afterwards Woodward took it, he would be a trespasser. But we say to you, that if the writ which the sheriff had in his hands did not command him to replevy this 11,941 feet, and if the sheriff in his return has not returned that he replevied it, if it does not belong to the 60,500 feet of lumber at Dushore Switch, then the action of the sheriff and of Woodward there, as testified to by themselves, and under all the evidence in this case, would not amount to a recaption of this property by Garey so as to make Woodward a trespasser in taking it away afterwards.⁶

Counsel for the defendant requests us to say:

2. "That unless the jury find from the evidence that the lumber in controversy was a part of the 60,500 at the Dushore Switch, the title was not adjudicated in the replevin suit as against the defendant, and the verdict should be for the defendant."

Answer: This we affirm.⁷

The jury returned a verdict in favor of the defendant. Judgment having been entered, the plaintiff took this writ assigning as error, *inter alia*:

5, 6. The answers to plaintiff's points.⁵ ⁶

7. The answer to defendant's point.⁷

Mr. E. M. Dunham and *Mr. T. J. Ingham*, for the plaintiff in error.

Mr. H. F. Maynard and *Mr. Rush J. Thomson*, for the defendant in error.

OPINION, MR. JUSTICE STERRETT:

In May, 1883, at suit of present plaintiff, W. C. Garey, against O. A. Seeley, a considerable quantity of lumber was

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replevied by the sheriff at Dushore Switch, and delivered to plaintiff in the writ. Issue was joined on a plea of property in N. K. Woodward, defendant in this suit, and the cause was so proceeded in that a verdict in favor of the plaintiff was rendered and judgment entered thereon. That judgment was afterwards affirmed by this court, and Garey's title to the lumber was thus established: Seeley v. Garey, 109 Pa. 301.

It is claimed by plaintiff that the lumber in controversy in this suit was part of the larger lot embraced in the action of replevin; but, whether that be so or not, the evidence tended strongly to show that his title thereto was the same as to any part of the lumber that was undoubtedly replevied. It also tended to prove clearly that the defendant, Woodward, with knowledge of plaintiff's title to all the lumber, removed and sold the portion now in controversy. The fact that he took it and converted it to his own use, was not seriously disputed; but his contention was that it was not actually replevied, and therefore an action of trespass could not be maintained against him. At best, this defence is purely technical and without merit; but it was sustained by the learned judge of the Common Pleas, and he accordingly instructed the jury, as requested in defendant's second point, that unless they found from the evidence that the lumber in controversy was part of the 60,500 feet at Dushore Switch, the title was not adjudicated in the replevin suit as against defendant, and their verdict should be in his favor. This is the subject of complaint in the seventh specification. Substantially the same instruction is complained of in the third, fourth, and fifth specifications. The case was thus made to turn solely on the question, submitted to the jury as a question of fact, whether the lumber in controversy was or was not included in the replevin suit. In that we think there was error, because there was evidence from which the jury might have found other facts sufficient to warrant a verdict in favor of plaintiff. The evidence tended strongly to prove that the lumber in controversy was part of a larger lot, the title to which was in plaintiff, and that defendant with knowledge of the fact, brought home to him in the trial of the action of replevin, removed and converted to his own use the part now in controversy. If the jury had so found, as they might have done from the evidence, their verdict would not

Syllabus.

necessarily have been for defendant. Under such circumstances a demand on defendant for the lumber would have been an idle ceremony.

The remaining specifications are not sustained. The last clause of plaintiff's first point, the refusal of which is complained of in the fifth specification, could not have been affirmed without qualification. It would have been error to do so, and hence the court was justified in refusing it.

Judgment reversed, and a venire facias de novo awarded.

D. VANHORN ET AL. v. J. CORCORAN ET AL.

ERROR TO THE COURT OF COMMON PLEAS OF LYCOMING COUNTY.

Argued March 18, 1889—Decided June 28, 1889.

[To be reported.]

1. The act of May 1, 1876, P. L. 89 (supplementary to the limited partnership act of June 2, 1874, P. L. 271), authorizing subscriptions to the capital of a limited partnership to be made in property other than cash, contemplates property available for the business of the company and for the payment of its creditors.
2. The certificate must set forth, in its statement, such a description of the property contributed as will enable creditors to ascertain precisely of what the property consisted, and to judge of its value; otherwise, the requirements of the act as to a description of the property are not complied with.
3. Where the statement of the recorded certificate showed that a subscriber "paid in merchandise, lumber, book accounts and bills receivable, transferred to this association, \$21,609.18 and in cash \$3,390.82, making a total subscription \$25,000.00" description of the property contributed was insufficient.
4. In such case, it was made to appear that the \$21,609.18, so contributed, represented the difference between the estimated assets and liabilities of a firm subscribing to the capital of the association, and if the statement had certified "in this respect according to the fact," the organization would have been defective.
5. Parties doing business as a limited partnership under a defective certi-

127	255
134	473
127	255
146	443
127	255
151	86
127	255
160	88
127	255
170	304
170	315
127	255
172	645
127	255
177	284

127	255
24	SC '639
127	255
31	SC '137

Statement of Facts.

ficate of organization, are liable as general partners to a common law action, and creditors are not confined to the remedy provided by § 2, of the act of June 2, 1874.

Before PAXSON, C. J., STERRETT, GREEN, CLARK and WILLIAMS, JJ.

No. 338 January Term 1888, Sup. Ct.; court below, No. 221 December Term 1886, C. P.

On October 15, 1886, Daniel Vanhorn, Benjamin Griffin, Charles M. Vanhorn and David H. Roberts, trading as Vanhorn, Griffin & Co., brought assumpsit against James Corcoran and Byron L. Richards, late doing business as Corcoran, Richards & Co., and a number of other persons and copartnerships, together doing business under the name of the Luppert & Kline Furniture Company, Limited, to recover upon certain notes given for the value of merchandise sold and delivered. The defendants pleaded non-assumpsit, payment, payment with leave and set-off.

At the trial on January 23, 1888, the plaintiffs put in evidence the notes upon which suit was brought, and also the articles of association of the Luppert & Kline Furniture Company, Limited, dated August 12, 1882, filed and recorded August 16, 1882. These articles set forth the association of the parties executing the same as a limited partnership, "under and in pursuance of the act of June 2, 1874, P. L. 271, and its several supplements," and contained a statement which in part was as follows:

First. The full names of the persons so associating themselves together and the amount of capital subscribed by each are as follows:

George Luppert, who subscribes	\$35,000
Isaac Newton Kline, John K. Heilman and Abraham H. Heilman, doing business as A. H. Heilman & Company, who subscribe	25,000
James Corcoran and Byron L. Richards, doing business as Corcoran, Richards & Company, who subscribe	10,000
Alexander M. Dean, who subscribes	10,000
John Artley Beeber, who subscribes	10,000
Morton David Banks, who subscribes	10,000

Statement of Facts.

Second. The total amount of the capital of said association is one hundred thousand dollars, being subscribed this day, and to be paid by the subscribers thereto as follows : Partly by the conveyance and transfer of certain real and personal property, and partly in cash ; the whole of which is declared to be of the value of one hundred thousand dollars, and is scheduled as follows :

George Luppert paid by a credit on the purchase money of a certain piece of real estate, on which is erected a furniture factory, with all the necessary machinery, etc., lately occupied by Luppert, Kline & Co., situate in Armstrong township, this day conveyed to this association, ...	\$35,000
Morton D. Banks paid by securing for this association a further credit on the said purchase money from the said George Luppert, for the real estate so as aforesaid conveyed, ...	10,000
Isaac N. Kline, et al., doing business as A. H. Heilman & Co., paid in merchandise, lumber, book accounts, and bills receivable, transferred to this association \$21,609.18, and in cash, \$3,390.82, making a total subscription, ...	25,000
James Corcoran, et al., doing business as Corcoran, Richards & Co., will pay by delivering to this association, poplar, bass and ash lumber, at market prices during the five months, from August 1, 1882, with interest, ...	10,000
A. M. Dean will pay in cash, in five equal monthly payments, from August 1, 1882, with interest, ...	10,000
J. A. Beeber will pay in cash, in five equal monthly payments, from August 1, 1882, with interest, ...	10,000

Third. The business to be conducted is that of the manufacture and sale of furniture of all kinds, with the right to hold real estate, either as purchasers or lessees, and the location of the business is at the factory in Armstrong township, Lycoming county, Pennsylvania.

Fourth. The name of the association is the "Luppert & Kline Furniture Company, Limited."

The plaintiffs then rested, when the defendants called Isaac N. Kline, and made the following offer :

Statement of Facts.

Defendants' counsel propose to show by the witness on the stand, and other witnesses, that I. N. Kline, the witness, was secretary and treasurer of the Luppert & Kline Furniture Company, Limited, a joint stock association organized under the act of June 2, 1874, and its supplements. That the original subscribers to the said certificate of association paid the amount of their subscriptions respectively and wholly to the company so organized, and in the manner in the said articles of association set out, except that in the case of James Corcoran and Byron L. Richards, a subscription which by the terms of the article was payable in lumber, and was actually paid in cash within five months from the date of the organization of the company, with interest; that George Luppert conveyed to the Luppert & Kline Furniture Company, Limited, real estate in Armstrong township, which constituted the plant of the company so organized for the purpose of manufacturing furniture; that the price stipulated between the copartnership so formed and the said George Luppert, at the time the association was formed, was the sum of about \$52,000; that the subscription of George Luppert, to wit, the sum of \$35,000, was paid as stipulated in the articles of association, being an allowance by him of the credit to that extent of the purchase money; that the subscription of M. D. Banks of \$10,000 was fully paid by the further allowance made by said Luppert to the Luppert & Kline Company, Limited, to the credit upon said purchase money, making altogether the sum of \$45,000, and that the balance of said consideration, to wit, the sum of about \$8,000, was paid by the company in cash to the said Luppert; that the subscription of I. N. Kline, J. K. Heilman and A. H. Heilman, amounted to the sum of \$25,000, and was paid as follows: By the transfer to the company, limited, of merchandise, lumber, book accounts and bills receivable, the sum of \$21,609.18; a schedule of which was at the time duly made, and the value of the properties in said schedule contained appraised at their true cash value, and that the remainder of said subscription of \$25,000 was by said I. N. Kline and others paid in cash, being the sum of \$3,309.82.

And further, that on December 29, 1884, I. N. Kline, J. K. Heilman and A. H. Heilman sold their entire interest in the limited company to Henry W. Steinhelper and retired from

Statement of Facts.

said company, the election of said stockholder to membership being immediately made by said stockholders to said company. That prior to that date the plaintiffs in this case had not sold any goods to said company, and had no dealings with them whatever. To be followed by actual notice to these plaintiffs, that before the sale was made upon which this suit is founded, of the retirement of I. N. Kline and others from the concern.

The purpose being to show compliance by the subscribers with the terms of the articles of association; and for the further purpose of showing that A. H. Heilman and others cannot be liable in any event as general partners in this case to these plaintiffs.

Plaintiffs' counsel object to the offer, so far as it does not refer to the withdrawal of the firm of A. H. Heilman & Co., and the offer to prove notice to the plaintiffs of such retirement, for the following reasons: (1) Because the evidence cannot be offered for the purpose of showing compliance with the provisions of the acts of assembly, as the acts of assembly provide that a statement shall be filed containing certain requisites, and these requisites cannot be supplied by evidence aliunde, or by any parol testimony. (2) The evidence offered is an attempt to prove by parol that the statement filed in pursuance of the acts of assembly contains matters that are not in the statement itself; and any defect in the statement cannot be aided by such testimony: it is a record; recorded in pursuance of an act of assembly, and must conform in every particular with the provisions of said act of assembly. The defect therein cannot be cured by any schedule or any matter that is not contained within the statement itself, and recorded with the statement. (3) The evidence offered would only be evidence in case this was a proceeding to enforce the balance on the subscription, and is not evidence where the issue is as in this case, where parties have made themselves liable by reason of non-conformity with the acts of assembly.

By the court: Objections overruled, evidence admitted; exception.¹⁸

On motion of the plaintiffs' attorneys, the pleadings were amended by striking the names of I. N. Kline, J. K. Heilman and A. H. Heilman, trading as A. H. Heilman & Co., as defendants.

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At the close of the testimony, the court, CUMMIN, P. J., after reading the certificate of organization of the furniture company, proceeded:

By these articles of association these persons agreed to form a limited partnership under the acts of assembly relating to that subject. On the day these articles of association were entered into, Mr. Luppert executed a deed in which his wife joined, to this limited company, for real estate of the value of some fifty-two or fifty-three thousand dollars. Now on the 16th of August this deed was filed and recorded: this put the title of the real estate in this limited company. Mr. Luppert subscribed \$35,000; M. D. Banks subscribed \$10,000; A. H. Heilman & Co. \$25,000; Corcoran, Richards & Co. \$10,000; Alexander M. Dean \$10,000, and J. A. Beeber \$10,000, thus making up a total sum of \$100,000, which was the amount of capital named in the articles of association.

Now was this capital stock paid into the company? The evidence is clear and satisfactory that the real estate which was transferred by Mr. Luppert to this company was of the value of the consideration named, \$52,000 in round numbers. He had subscribed for \$35,000 of the stock; that left him a balance of \$17,000 due from the company after he had made the deed. Mr. Banks, who had subscribed \$10,000, arranged for the balance of that \$10,000 out of the \$17,000, in such a way as was satisfactory to Mr. Luppert. Mr. Luppert gave the credit, and so the company received that credit. That left a balance of \$7,000. A. H. Heilman & Co. subscribed \$25,000. They paid their subscription partly in personal property and partly in cash, and the evidence is clear and satisfactory that all the real and personal property was of the value it was represented to be. Corcoran, Richards & Co. subscribed to pay in lumber, but they paid in cash within the time; Alexander M. Dean subscribed in cash and paid in cash; J. A. Beeber subscribed in cash and paid in cash. The real estate and personal property was worth at the time it was turned in, the several amounts it was put in at. The appraisements had been made by disinterested parties, and the evidence is satisfactory that the whole capital stock of \$100,000 was paid into this limited company in cash or its equivalent.

* * * * *

Charge of Court below.

The next day we come to is April 22, 1885. This is the day when this bill of goods was sold by the plaintiffs to this limited company. These notes in suit were given by the company to the plaintiffs in May, June and July, 1886. This limited company is certainly liable for this debt, and under a proper action a judgment would certainly be entered in favor of the plaintiffs against the company, limited. This the plaintiffs now ask, but they claim that the members of the company, limited, are liable as general partners, and as such seek to hold them in this action. [They claim that defective statements were made at the formation of this company, limited; not false or fraudulent, but defective, in this, that they do not state particularly the items and property turned in, with the respective value of each item set out. The statements filed are not, perhaps, as fully descriptive as they should have been, but surely if they are true, if the full value was there, and the company received the benefit of it, which is fully established by the evidence, it is the same as if the whole amount had been paid in cash.] ¹⁶

Persons who might deal with this company, limited, had a right to expect that they had at their organization one hundred thousand dollars in cash, or its equivalent. As it has been shown that this full capital has been paid in, I cannot believe that more is required of the members of this company. This is the chief or material compliance with the statute under which they are organized. The whole capital stock was then paid in. How can the plaintiffs say that they were misled, or suffered any injury by statements of property not being fully descriptive, as they might have been, when this technicality is without a spark of merit, and ought not to have weight in determining this case under the facts as established?

Sundry points have been submitted by counsel.

The plaintiffs' counsel respectfully ask the court to charge the jury as follows:

1. That the articles of association filed by the defendants, and under which they claim to have been organized and carried on business as a limited copartnership, are defective upon their face, in that the description of the property subscribed is too general to enable any one to form a correct estimate of the extent of the property, and gives only a lumping valuation,

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which renders it equally difficult to judge of the value of the property subscribed, and is therefore not a compliance with the requirements of the act of 1876, and the defendants are liable as general partners.

* * * * *

9. That under all the evidence in this case the plaintiffs are entitled to recover.

Answer: The plaintiffs' points are all refused, under the evidence established in this case.^{1 9}

Defendants' counsel respectfully ask the court to charge the jury as follows:

1. That the defendants, having entered into an association under the act of June 2, 1874, and its supplements, and having signed and acknowledged a certificate or articles of association setting forth the full names of the persons associated, the amount of the capital of said association subscribed for by each, the total amount of capital, and when and how to be paid, the character of the business to be conducted and the location of same, the name of the association with the word "Limited" added thereto as part of the same, as provided by said act, the liability of the defendants is measured by their subscriptions respectively, and no suit can be maintained against them as general partners.

2. That the Luppert & Kline Furniture Company, Limited, is primarily liable for the debts of the association, and that the unpaid subscriptions to the capital stock, if any, made by the members respectively, can only be collected in the manner provided by the act under which the association is formed, after judgment against the association itself.

3. That if the jury believe from the evidence that certain of the defendants subscribed and paid their subscriptions in cash, and that one or more of the defendants subscribed and paid part in cash and part in property, there can be no recovery against any of the defendants in this action, they being sued as general partners.

4. That it was the legal right of any subscriber to the capital stock of the Luppert & Kline Furniture Company, Limited, to make contributions to the capital thereof in real or personal estate or other property, at a valuation to be approved by all the members subscribing to the capital of said association; and any

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defect in the description or schedule of property so contributed, even if such defect exists, can only affect the parties so subscribing, and only to the extent of the value or amount of such defective subscription, and the remedy of the creditor is as for unpaid subscriptions under § 2 of the act of June 2, 1874.

* * * * *

7. That under all the evidence in this case the verdict must be for the defendants.

Answer: As to the first, second, third and fourth points: These points relate to the remedy of the creditors as against the limited copartnership. I am of opinion that these points should be affirmed. The second section of the act of June 2, 1874, relating to limited companies, provides a method for collecting unpaid subscriptions. That should be considered in connection with the act of March 21, 1806, 4 Sm. L. 332: "In all cases where a remedy is provided or duty enjoined, or anything directed to be done by any act or acts of assembly of this commonwealth, the directions of the said acts shall be strictly pursued; and no penalty shall be inflicted or anything done agreeably to the provisions of the common law in such cases, further than shall be necessary for carrying such acts into effect." This act of 1874 and its supplement of 1876 are widely different from the act of 1836. That act contained many penalties, and they were named as penalties. If persons going into such a partnership did not do this, or that, or omitted to do this, or that, they were held as general partners. No such thing is found in the acts of 1874 or 1876. Both the latter acts relate to a different kind of partnership. The law in relation to limited companies now requires that the members must pay up their capital stock, and if they do not, or if they do it in such a manner that it may be declared in law a nullity, then there is a remedy to make them pay their subscription; and it seems to me that there is a full remedy provided in the act of 1874 to protect everybody against these companies.¹⁰

* * * * *

The seventh point is affirmed.¹⁵

[Gentlemen of the jury, the plaintiffs have not made out a case which would entitle them to your verdict. You will therefore render your verdict for the defendants.]¹⁷

Arguments.

The jury returned a verdict for the defendants, as directed. Judgment having been entered, the plaintiffs took this writ, assigning as error, *inter alia* :

- 1, 9. The answer to the plaintiffs' points.^{1 9}
- 10, 15. The answers to the defendants' points.^{10 15}
- 16, 17. The portions of the charge embraced in []^{16 17}
18. The admission of the defendants' offer.¹⁸

Mr. Samuel Linn (with him *Messrs. J. J. & V. H. Metzger* and *Mr. Arthur D. Williams*), for the plaintiffs in error.

Counsel cited: Act of June 2, 1874, P. L. 271; Act of May 1, 1876, P. L. 89; *Maloney v. Bruce*, 94 Pa. 249; *Eliot v. Himrod*, 108 Pa. 569; *Keystone B. & S. Co. v. Schoellkopf*, 11 W. N. 132; *Bement v. Phila. Brick Co.*, 5 W. N. 58; *Bates on Limited Part.*, § 50; *Haggerty v. Foster*, 103 Mass. 17, 19; *Durant v. Abendroth*, 69 N. Y. 148, 152 (25 Am. Rep. 158); *Pierce v. Bryant*, 5 Allen 91; *Andrews v. Schott*, 10 Pa. 55, 56; *Vandike v. Roskam*, 67 Pa. 330.

Mr. J. A. Beeber and *Mr. H. C. McCormick*, for the defendants in error :

If a limited partnership association is formed under the act of 1874 and its supplement of 1876, permitting property to be contributed as capital if properly scheduled, and it appears by the statement filed that some of the members paid their subscriptions by contributing property, others partly in cash and partly in property, and still others wholly in cash, and on the trial of a case brought to make the members liable as general partners, it is shown that the cash was actually paid as agreed, and that the property was contributed and of the value set forth, can a verdict be recovered against all the members as general partners, because the property so contributed was not fully itemized? We contend that under the statutes and the decisions of this and other courts, no such verdict can be rendered : Act of June 2, 1874, P. L. 271; Act of May 1, 1876, P. L. 89; *Maloney v. Bruce*, 94 Pa. 252; *Keystone B. & S. Co. v. Schoellkopf*, 11 W. N. 133; *Seibert v. Bakewell*, 87 Pa. 506; Act of March 21, 1806, 4 Sm. L. 332; *Koch v. Water Co.*, 65 Pa. 288; *Bement v. Brick Co.*, 12 Phila. 494; *Brown v. Benner Trap Co.*, 18 W. N. 114; *Lauder v. Tillia*, 117 Pa. 304.

Opinion of the Court.

OPINION, MR. CHIEF JUSTICE PAXSON :

The first assignment of error presents a question which controls this case. It alleges that "the court erred in their answer to the plaintiffs' first point, which point was:—

"That the articles of association filed by the defendants, and under which they claim to have been organized and carried on business as a limited copartnership, are defective upon their face, in that the description of the property subscribed is too general to enable any one to form a correct estimate of the extent of the property, and gives only a lumping valuation, which renders it equally difficult to judge of the value of the property subscribed, and is therefore not a compliance with the requirements of the act of 1876, and the defendants are liable as general partners."

The answer of the court was: "Refused under the evidence established in this case."

The defendants were sued as general partners. Their defence was that they were members of a limited partnership organized under the act of June 2, 1874, P. L. 271, and its supplement of May 1, 1876, P. L. 89. The former act requires a cash capital; the latter allows the members to make contribution to the capital "in real or personal estate, mines, or other property, at a valuation to be approved by all the members subscribing to the capital of such association: Provided, That in the statement required to be recorded by the first section of said act, subscriptions to the capital, whether in cash or property, shall be certified in this respect according to the fact; and when property has been contributed as part of the capital, a schedule containing the names of the parties so contributing, with a description and valuation of the property so contributed, shall be inserted."

It will be noticed that the act gives a wide latitude as to the kind of property that may be contributed as capital. At the same time, it is very evident that it contemplates a real actual capital in cash, or in property available for the business of the company and the payment of its debts. It was never intended that the property contributed as capital should be moonshine, wild-lands, or water-lots. If the business be merchandising, a stock of goods and the store-house in which they are contained would be legitimate; if the business be mining, a mine with its

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machinery and improvements would be appropriate; and if manufacturing, the factory building, with its machinery and the stock, manufactured and unmanufactured, would be in the direct line of its business, and therefore a proper and available contribution to capital. The point of these remarks will appear later.

The capital stock of this association consisted of \$100,000. A portion of this was contributed in cash. An examination of the certificate shows, however, that "Isaac N. Kline et al., doing business as A. H. Heilman & Company, paid in merchandise, lumber, book accounts, and bills receivable, transferred to this association, \$21,609.18, and in cash \$3,390.82, making their total subscription \$25,000."

This description of the property contributed is upon all fours with that contained in *Maloney v. Bruce*, 94 Pa. 249, of which it was said by this court: "This is not the kind of schedule contemplated by the act of 1876. The description is too general to enable any one to form a correct estimate of the extent of the property, and a lumping valuation renders it equally difficult to judge of values. The property contributed was intended as the equivalent of a cash capital, and the plain object of the provision in the act of 1876, requiring a schedule, was to enable creditors to ascertain precisely of what the property consisted and to judge of its value. If parties seek to have all the advantages of a partnership, and yet limit their liability to creditors, they must comply strictly with the act. Where property has not been contributed, scheduled and valued, as the act of 1876 directs, there is no payment of the capital."

The description in this case is even more vague than in *Maloney v. Bruce*. It consists of "merchandise, lumber, book accounts, and bills receivable." A creditor looking at this description could not form any estimate of its quantity, character, or value. For all practical purposes it might as well have been omitted. If the property had been properly scheduled, an estimate of its value might have been made approximating the truth. As an illustration, if the general and indefinite word "lumber" had been followed by the words "consisting of 100,000 feet of No. 1 yellow pine flooring," almost any business man could have formed a fair idea of its value, or he could have ascertained it from any one engaged in the lumber business.

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The learned counsel for the defendants below evidently felt the strain of this part of their case when they made the offer of evidence embraced in the eighteenth assignment. The evidence referred to was admitted by the court, and if properly assigned for error we would discuss and rule the point.* As it was not properly assigned, we refer to it merely to say that the evidence received in support of it only made the defendants' case so much the worse. For it thus appeared that the defendants did not contribute any specific property at all; they merely contributed their interest in a firm, with estimated assets of \$75,000 and certain debts of \$53,000. The value of the difference between the two was the alleged contribution of \$21,609.18. The assets of the firm, estimated at \$75,000, were turned over to the limited partnership, subject to \$53,000 of debts which the latter assumed to pay. It is easy to see, therefore, why there was no schedule of the property contributed. There was no property to schedule. The whole of it in equity was liable to creditors, and could not be withdrawn from them without fraud until the last dollar of the debts of the firm was paid. So that instead of property the defendants contributed a mere equity, to wit, whatever was left of the assets of the firm after the payment of its debts. Their allegation in the certificate that they had contributed \$21,609.18 in property was inaccurate, and came dangerously near being a false statement, though I do not think it was so intended. Had the certificate set forth that their contribution consisted of their interest in a firm subject to the payment of its debts, it would have conformed to the truth, but it would not have been a compliance with the act of 1876. That act contemplates such contributions as shall be available to aid the business and pay the creditors of the limited partnership. Of what use was this contribution? It could not properly be made available until the debts were paid. To turn the property and pay \$53,000 of debts requires time. In the meanwhile the debts are drawing interest, and by the time the assets are converted, even if there is no shrinkage, there may be little surplus left. The court below was evidently misled by the idea that the assets were worth their estimated value of

* See *Hawes v. O'Reilly*, 126 Pa. 440; *Battles v. Sliney*, 126 Pa. 460.

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\$75,000. Conceding that they were, it by no means follows that the margin between the assets and the debts was worth \$21,609.18. The evidence does not show that it was, or that the company has realized any such sum, or any sum whatever, after the payment of the \$53,000.

The defendants contend, however, that even if there was an irregularity in the formation of the association, they are not liable as general partners, but that the plaintiffs must proceed under the act of 1874, as was done in *Maloney v. Bruce*, supra. It is true, in that case there was no attempt to hold the defendants as general partners; the suit was against the company, and after judgment, leave was granted to take out execution against the defaulting member. The creditor there had his election to proceed against the association as a valid organization and pursue the remedy pointed out by the act of 1874, or, to hold all the members liable as general partners. He chose the former. In the case in hand, the creditors elected to treat the members as general partners, or as liable as such. This they had a perfect right to do. Prima facie, a firm transacting business is a general partnership. It can only shelter itself behind the act of 1874 and its supplements by showing a strict compliance with the law. It was said in *Eliot v. Himrod*, 108 Pa. 569, "Each partner is liable unless saved by statute. If the partners have not complied with the statutory requisites a limited partnership has not been formed." To the same effect is *Maloney v. Bruce*, supra. This is the key to the whole situation. A limited partnership that has not complied with the law of its creation is not a limited partnership at all; it is, however, a partnership in which all the members are liable as at common law. If the defect appears upon the face of the certificate, it is the duty of the court to rule it as a question of law. It would lead to more than confusion to permit a defective schedule like this to be supplemented by evidence to show that there really was property and that it was of the value indicated. It would open the door to all kinds of fraud and perjury, and no man could know whether such an association was a valid limited partnership, until after the verdict of a jury.

As there were no disputed facts in this case, the learned

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judge below should have given the jury a binding instruction to find for the plaintiffs for the full amount of their claim.

Judgment reversed and a venire facias de novo awarded.

APPEAL OF HARMONY LODGE, I. O. O. F.

[WILL OF EDMUND C. WISEMAN, DECEASED.]

FROM THE DECREE OF THE ORPHANS' COURT OF PHILADELPHIA COUNTY.

Argued April 4, 1889—Decided June 28, 1889.

Where, upon the hearing of a citation to show cause why an issue devisavit vel non should not be ordered on the ground of mental incapacity, the testimony submitted disclosed that the only allegation against the mental soundness of the testator was a habit of periodical but excessive drinking; that not even ordinary intoxication at the time the testamentary paper was executed was established; and that the instrument was dictated by the testator and well understood by him at the time and after, there was no sufficient evidence upon which a verdict adverse to the instrument in question should be sustained, and it was not error to refuse the issue.

Before STERRETT, GREEN, WILLIAMS, MCCOLLUM and MITCHELL, JJ.

No. 214 January Term 1889, Sup. Ct.; court below, No. and term not given.

On February 3, 1887, the Harmony Lodge, I. O. O. F. No. 16, filed an appeal from the decree of the register of wills of Philadelphia county, admitting to probate the will and codicil of Edmund C. Wiseman, deceased; praying for an issue devisavit vel non in respect of the codicil to said will.

After argument upon the testimony submitted by depositions taken, the court, HANNA, P. J., on July 7, 1888, filed the following opinion, in which the facts are sufficiently recited:

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From the testimony in this matter it appears that testator, on June 8, 1885, executed his last will and testament, whereby after providing for the interment of his remains by the Harmony Lodge of Odd Fellows of this city, he bequeathed both specific and pecuniary legacies, among which the sum of \$50 to Samuel Wistar, then in his employ for several years, and the sum of \$500 to Harmony Lodge, in trust to invest for the benefit of inmates of the Odd Fellows' Home. To this Lodge he also bequeathed the residue of his estate absolutely. Testator further appointed the presiding officer of the lodge at the time of his decease, and Samuel Wistar, executors of his will, giving to each the sum of \$50, as compensation for his services.

But for reasons satisfactory to himself, he subsequently concluded to alter the provisions of his will respecting the bequest to Harmony Lodge, and accordingly on February 4, 1886, almost eight months after the date of his will, executed a codicil, whereby he revoked the directions for the interment of his body by the lodge, and also the bequest of \$50 to Samuel Wistar and the further sum of \$50 to him as commissions as executor, and in lieu thereof bequeathed to him the stock, fixtures and good-will of his cigar store. He further revoked the bequest to Harmony Lodge, and the appointment of its presiding officer as one of his executors, and bequeathed the sum of \$500, which by his will he had bequeathed to said lodge, to his cousin, William H. Coleman, whom he also appointed an executor, and to be in full compensation for his services as such.

This codicil was prepared by testator's attorney, to whom several days previously he had given the necessary instructions, and after it had been carefully read to him and compared with his written memoranda, was executed in the presence of his attorney and an employee in his cigar store, as subscribing witnesses. It will be observed that none of the remaining bequests contained in the will were disturbed or revoked.

Testator was unmarried and without children; his nearest of kin being his father, who still survives, and it may be well to remark, although not a legatee either by will or codicil, is not a party contestant. A few weeks after the execution of the codicil, testator, having long contemplated an ocean voyage, prevailed upon his father to accompany him. They sailed

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together in March, 1886, for Europe, where they remained about two months.

For some time previous to testator's visit abroad, he had complained of failing health, superinduced beyond doubt by too frequent use of spirituous liquors. For nearly ten years he had wholly abstained, but in the summer of 1885 resumed the habit of excessive tipping. He, however, attended to his business, which had proved lucrative during his years of sobriety, although from about the time mentioned, in the main it was committed to the management of his trusted employee, Samuel Wistar. The habit which had become fixed and a species of chronic disease with testator, was deeply deplored by him, and led him to endeavor to escape its thralldom by voluntarily becoming an inmate of that excellent and benevolent institution, the Franklin Reformatory Home, where, upon seven separate occasions between July, 1885, and August, 1886, he was admitted for treatment. He remained at the home periods ranging from three days to two weeks, and strange to say, on each occasion he went to the home entirely sober, would go out and return sober, transact business while there, and the superintendent testified, "I never saw him drunk, and we never treated him as a drunken man." Testator's apparent reason for seeking the retirement, regimen and discipline of the institution was, if possible, to overcome the terrible appetite for strong drink to which he eventually succumbed. His last visit to the home was in August, 1886, which unfortunately was of but three days duration. He then returned to his own residence. The old appetite reasserted its sway, and finally, after an illness of three or four months, the disease, cirrhosis of the liver, from which he suffered, and was produced by his intemperance, culminated in his death on November 2, 1886.

The validity of the codicil is now denied by Harmony Lodge, and it is asserted it should be set aside upon two grounds, first, that at the time of its execution testator was not of sound and disposing mind and memory; and that second, its execution was produced by undue influence.

The last reason assigned we will first dispose of. And it will suffice to say that it was neither urged at the argument nor attempted to be supported by testimony.

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As to the remaining reason, the alleged testamentary incapacity of testator at the date of the execution of the codicil, our conclusion is, after a careful examination of the entire testimony, that not only is the contrary satisfactorily shown, but we would not be justified in imposing upon the parties interested in this small estate the expense and delay incident to a trial by jury, where, upon the vague, meagre and indefinite testimony presented by the contestants, a verdict against the validity of the codicil should be permitted to stand.

The testamentary capacity of the testator at the date of his will is conceded by contestants; but they allege and attempt to prove that on February 4, 1886, the date of the codicil, he was so stupefied from the use of alcoholic stimulants as to be unable to comprehend the testamentary act, and incapable of an intelligent disposition of his estate.

But from the testimony produced by the contestants, it is shown that testator, a day or two prior to the date named, sent for his lawyer, who, when he called at testator's residence, had an interview with him alone; and, as appears from the testimony of the attorney subsequently, this was the occasion he received instructions from the testator for the preparation of the codicil, and was handed the memoranda therefor written by him.

Contestants also show that testator attended to some of the details of his business immediately prior to the execution of the codicil, although at its date he was confined to his room from illness, and gave to it personal supervision prior to the date of the codicil. That testator, prior to February 4, 1886, had been drinking intoxicating liquor immoderately is clear, from the testimony of the physician who was called to attend him on that date. He testifies that when he saw testator "he was very nervous, weak and suffering from mental and physical prostration at the time; it was attributed to over stimulation; there were times when he would be able to make or alter a will during the time I saw him, and there were times when he was too incoherent to do so, that is to make or alter a will." In reply to the question, "was he drunk or sober when you saw him on February 4, 1886?" the witness said, "it would be impossible for me to say yes or no, as I saw him then for the first time; but he was troubled with delusions and saw figures

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on the wall, and spoke of having seen them during the night and heard voices."

This witness further testified that in his opinion testator did not, at the time of his visit, possess a sound mind, memory and understanding, from the incoherency of his conversation, his nervousness and suffering from over stimulation, but such a person may afterwards be of a sound mind, memory and understanding; that testator held his hands to his head, complained of noises and confusion he had heard during the night, in his head, and "was crying at the time he was making these remarks to me;" that while in his opinion testator was not suffering from incipient mania a potu, the direct result of over stimulation as ordinarily seen in drunkenness, yet he had evidently been drinking a number of days before he saw him, and was in that condition of mania a potu produced by a withdrawal of stimulants after over stimulation; and consequently he considered it imprudent to withhold all liquor from him and directed his attendant to allow him a certain quantity at stated intervals.

So far as appears from the testimony, this witness, who is produced as the attending physician and expert, made but a single professional visit to the testator of less than one hour's duration, which happened to be upon the day the codicil was executed; and he does not venture to say that testator was intoxicated or so stupefied from the use of liquor as to be mentally incapable of a testamentary act.

But two other witnesses were produced by the contestants. One a nurse or attendant upon testator, who at his request performed such services for him from February 1st, for a period of six days, and was at testator's house in a room adjoining that occupied by him at the execution of the codicil, saw the attorney and the other attesting witness, and after their departure was informed by testator he had changed his will by giving the \$500 he had intended for the old men at the home to his cousin; and this same witness admitted that testator, while he did not then inform her he had also bequeathed his store and business to Samuel Wistar, yet on a previous occasion, after the execution of his will, he stated to her that such was his intention. And during the last illness of testator he caused the will and codicil to be taken from the box in which he placed them in

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safe keeping, and read to her in his presence by a friend of the witness, but who was not produced to testify. This witness, while she describes the repeated efforts of testator to obtain liquor, his frequent drinking by day and night, his manner during the single interview with the physician as related by the latter, yet does not undertake to say that at the execution of the codicil of which she was practically a witness and herself a legatee in the will, he was intoxicated, or so much under the influence of liquor that he was unconscious of the testamentary act he then performed, and incapable of intelligently disposing of his estate.

The testimony of the remaining witness for contestants has but little if any bearing upon the question, and it is extremely uncertain whether the incidents related by her occurred prior or subsequent to the execution of the codicil.

We have thus fully referred to the contestants' case to show that while Harmony Lodge is doubtless disappointed by the failure of testator to bequeath it the legacies he primarily contemplated, yet his undoubted right to dispose of his property as he deemed best must be respected and maintained, as much in his ultimate as in his prior disposition of it; and such disposition cannot be interfered with nor frustrated, except upon clear and satisfactory proof of mental incapacity at the time of revocation of his previous testamentary act, or that his power of will was under the subjection and improper influence of another, so that in reality the codicil was the will of the latter, and not of the testator.

The testimony on the part of the contestants, while it shows the testator to have been addicted to the immoderate use of intoxicating liquors, yet he was not a sot, reeling and staggering before the public gaze. He was conscious of his infirmity, which grew to be a disease, and, as he finally realized, unconquerable. He sought, by retirement to the Franklin Home, to overcome the appetite he knew would prove his ruin, but would emerge and relapse into his former habit. And at the date of execution of the codicil he was seeking recovery from the prostration produced by abstaining from proper food and the excessive use of stimulants. Yet the evidence is indisputable that at the same time he was successful in business and gave personal supervision to his store and over his employees.

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And such was his concealment of his intemperance that his father, those with whom he had business dealings, and even the officials of the Franklin Home, were either in total ignorance of his habit or of its extent. That at the time of the execution of the codicil, testator, although suffering as stated, was rational and fully comprehended the nature and character of the testamentary paper, we think there can be no question, and this is shown by the testimony of the principal witness for the contestants, by his declaration to her immediately after the codicil was executed. And that testator fully comprehended his surroundings and his condition is further evident from his retiring again to the Franklin Home the second day after the date of the codicil, where he remained two weeks, and soon afterwards he with his father visited Europe as already stated.

We have not referred to the testimony on the part of the proponents, as it is unnecessary. But it may be said that while some of the witnesses recognized the intemperate habits of testator, others with whom he had business transactions were not aware of it. Both the counsel who prepared the codicil and the other subscribing witness are clear and convincing upon the entire testamentary capacity of the testator at the time of its execution; and, with the superintendent of the Franklin Home, all unite in their testimony that he was possessed of unusual business qualifications, determined will, generous impulses and benevolent disposition; so that it is not a matter of surprise, that he, unmarried and childless, should conclude to carry out his previously expressed intention of rewarding his faithful employee, and upon the eve of his departure execute the codicil bequeathing him his store, good-will, etc., and, preferring his cousin to the lodge of which he was a member, bequeathed him the legacy he had before intended for the lodge.

It is with pleasure we commend the industry and ability shown by the counsel for the contestants who has presented the case for our consideration; but, notwithstanding the earnestness evinced by her, for the reasons stated we must dismiss the appeal and refuse the issue, the costs to be paid by the contestants.

A decree refusing the issue prayed for, having been entered in accordance with this opinion, the Harmony Lodge took this appeal, assigning the decree of the court as error.

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Mrs. Carrie B. Kilgore, for the appellant.

Counsel cited: *Duffield v. Robeson*, 2 Harr. (Del.) 375, 383; *Redf. on Wills*, part I., 161-2; *Shelford on Lunacy*, 274; *Barrett v. Buxton*, 2 Aik. 157 (16 Am. Dec. 691).

Mr. George L. Crawford (with whom was *Mr. George M. Dallas*), for the appellee.

OPINION, MR. JUSTICE GREEN:

A most patient and careful reading of all the testimony in this case impels us to say that there is absolutely no evidence, whatever upon which it would be at all possible to sustain a verdict adverse to the will in question. We concur fully with all that is said in the opinion of the learned court below, and affirm the decree for the reasons there stated. There are really no facts in proof which show, or even tend to show, a condition of mental unsoundness at the execution of the codicil. The only opinion expressed that is worth a moment's consideration is that of Dr. Strittmatter, and he was unable to say whether the testator was drunk or sober, or had incipient symptoms of mania a potu, at the time he saw him. The testator was suffering from the effects of over-stimulation, and exhibited some, though not by any means the worst, of the symptoms of that condition. The doctor says: "He was very nervous, weak, and suffering from mental and physical prostration at the time; it was attributed to over-stimulation." He adds, "there were times when he would be able to make or alter a will during the time I saw him, and there were times when he was too incoherent to do so, that is, to make or alter a will." The whole of the testimony of this witness shows a condition of mind and body constantly seen in persons who have been taking alcohol in excess, but he does not state a single fact which exhibits in any degree a condition of mental unsoundness indicating an inability to comprehend the nature and character of the testamentary act or the particular manner of its exercise in the instance in question. So far from this being the case, the contestant's chief witness, Elizabeth Lee, testified that the testator told her immediately after the codicil was executed, that he had changed the will, and "had taken away five hundred dollars from the old men at the home and had given it to

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Billy Coleman." As this was precisely what he had done, this testimony is proof conclusive that the testator was thoroughly acquainted with the contents of the codicil, and that he knew the objects and extent of his bounty both in the will and codicil, and the exact change which the latter made in the former.

The testimony of the two women, the only other witnesses for the contestants who expressed opinions, is of the most inconsequent and frivolous character, unsupported by any facts tending to show actual unsoundness of mind. If we regard the testimony of the proponents, it is simply overwhelming. The codicil was written by an attorney entirely disinterested, and solely at the dictation of the testator, who subsequently read it over, and said he was satisfied, and then executed it in the presence of two subscribing witnesses, both of whom testified that he was perfectly sound and rational at the time. A number of other witnesses who had known him long and intimately, testified that he was a man of unusual force of mind, and entirely sound at all times. The testator went to Europe, after the codicil was executed, with his father, and was gone several months, attended to business when at home, and in all respects conducted himself as a rational man. He was given to the bad habit of excessive drinking at times, but knew his failing well, and voluntarily went to a home for inebriates a number of times in order to avoid indulgence. Those who knew him best, both at the home and in his business, and who were entirely impartial and disinterested, most emphatically pronounced him of perfectly sound mind at all times.

When it is considered that the only allegation against his mental soundness was his habit of excessive drinking; that this was not continuous, but periodical; that the fact of even ordinary intoxication at the time the codicil was executed is not proved, and that it is proved without contradiction that the codicil was dictated by himself and perfectly well understood by him both at the time of execution and after, it would be an act of judicial unwisdom to subject the parties to the cost and vexation of a trial that could have but one result, and that prejudicial to the appellant. We are most clearly of opinion that the issue was properly refused by the court below.

Decree affirmed and appeal dismissed at the cost of the appellant.

COMMONWEALTH v. WILKES-BARRE ETC. RY. CO.

ERROR TO THE COURT OF QUARTER SESSIONS OF LUZERNE COUNTY.

Argued April 15, 1889—Decided June 23, 1889.

[To be reported.]

- (a) A street railway company, as required by its incorporating act, obtained the consent of borough authorities to occupy a public street, but upon condition that its track should be laid in the centre line thereof and in such manner that vehicles could cross without hindrance.
- (b) The track was laid in the centre line of the street, as required by the action of council, but upon an open space formed by the intersection of other streets there was a slight deflection of the track from the centre line, to enter upon the private property of the company.
1. The company being indicted for maintaining a nuisance in unlawfully obstructing the street by means of its track, in the absence of any averment in the indictment, or in an offer of proof, that the structure of the track, or its position, interfered in point of fact with public travel in any respect, the mere location of it did not constitute a nuisance, and the offer is inadmissible.

Before PAXSON, C. J., STERRETT, GREEN, WILLIAMS and MITCHELL, JJ.

No 230 July Term 1889, Sup. Ct.; court below, No. 256 September Term 1887, Q. S.

On September 7, 1887, the grand jury returned as a true bill an indictment charging that on, etc., at, etc., the Wilkes-Barre and Kingston Street Railway Company, a body corporate, etc., "unlawfully did erect, set up, establish, maintain, keep up, and continue, and still do keep up and continue a certain common and public nuisance, to wit: by unlawfully obstructing by means of the railway track of the said company, a certain public highway, to wit: Railroad street, in the borough of Kingston in said county, beginning at the intersection of said street with Main street, in said borough; thence along and upon said Railroad street to the easterly line of said borough, so that the good citizens of this commonwealth cannot pass and re-pass along the same without great danger and inconvenience, to the great damage and common nuisance of all good citizens of the commonwealth, contrary," etc.

Statement of Facts.

At the trial on June 28, 1889, the commonwealth put in evidence the act of April 14, 1859, P. L. (1860) 888, incorporating the company, which providing inter alia as follows:

"Section 4. That before the said company shall commence to use any street or streets in the boroughs of Wilkes-Barre and Kingston, the consent of the councils of said boroughs shall first be obtained; and the councils may from time to time, by ordinances, establish such regulations in regard to said railway, as may be required for the purpose of grading, etc., along said streets, and also to prevent obstructions thereon," etc.

The commonwealth then put in evidence a map showing the location of Railroad street, and the location of the street railway thereon, at the points involved in the controversy. This map is described in the opinion of this court, *infra*.

The commonwealth then proved the minutes of the Kingston borough council, of March 5, 1866. These minutes showed an ordinance or resolution of the borough council of that date, giving consent to the construction of defendant company's roadbed in the street, beginning at the boundary line of said borough near the east branch of Toby's creek, and running thence through the middle of the highway and through Willow street to the L. & B. Railroad, provided the railway company conformed to certain conditions, one of which was as follows:

"First. That the track of said railway shall be laid in the centre or middle of the said street, with a street rail in such a manner that wagons, sleighs, vehicles of every description can conveniently cross and re-cross said street without hindrance at any time and at any point, and in such a manner that the public may and can pass to and from the depot and the stone store with teams, wagons, sleighs and other vehicles at any time conveniently and without hindrance."

The commonwealth then made the following offer:

By the map already in evidence it appears that the street in question is a public street, and that the track of the defendant is located thereon, and that it is not located along the whole route of said street, in the centre thereof. Commonwealth now proposes to show by the minutes, that in March, 1866, the borough of Kingston consented to the location and construction of the defendant's railway, upon the centre of Railroad street; to be followed by evidence that a certain portion of the

Statement of Facts.

track in question in said borough and upon said street is not upon the centre line thereof, and that the same is an obstruction and inconvenient to the public travel, and a nuisance, and erected without authority or warrant in law, the nuisance consisting in so much of the track as diverges from the centre of the street to the southerly side thereof.

Objected by the defendant:

1. That the map already in evidence shows that the divergence is merely a turn-out to enable the railroad company to get from the centre of Railroad street on to the private land of the railroad company, and not a construction in violation of the resolution mentioned.

3. That the indictment contains but one count and avers only a nuisance "by unlawfully obstructing by means of the railway track of said company, a certain public highway, to wit: Railroad street in the borough of Kingston," etc., and does not charge that the road was constructed or maintained in its present place, without the consent legally obtained of the borough authorities, or that it was constructed or maintained in an unskilful or negligent manner.

By the court: While the particular offer now before us is that simply of the minute book of the borough of Kingston, showing the action of the borough council in regard to this railroad, there is also a general explanation accompanying this offer, showing the theory of the prosecution, accompanied by a statement of the evidence to be offered to sustain the allegation of a nuisance. From these offers and explanation, it appears to us that the charge of nuisance in this case must be sustained, if at all, by showing, that while the charter permitted this railroad to be built and while the assent of the borough of Kingston was secured as early as the year 1866, this assent contemplated the occupancy of the centre of a certain street, while the actual location made in 1866, and maintained since, has not been in the centre thereof, at a certain point. But it appears from the indictment that nothing of this kind is alleged therein as constituting the nuisance complained of. The indictment is couched in the most general phraseology and alleges a public nuisance without any particular specification of its nature, or of its effect upon the public; in other words, while alleging that the railroad in question is a

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nuisance because of a mislocation, the fact of mislocation is not set forth. Therefore we cannot admit this testimony. The indictment is defective. The objection is sustained and the evidence is rejected.¹

It was admitted that the road as shown on the map was constructed in 1866, and had been maintained in that location continuously since that time; also that the divergence from the centre to the southerly line of the street was in the borough of Kingston in 1866 and at the time of trial, and that that divergence was from 75 to 100 feet in length.

The court, WOODWARD, J., instructed the jury:

"We instruct you that in our opinion, as matter of law, this indictment is defective and will not sustain the evidence which is offered to show a nuisance at the point in question."²

The jury returned a verdict finding the defendant not guilty, and that the county of Luzerne pay the costs. The commonwealth then took this writ, assigning for error:

1. The refusal of the commonwealth's offer.¹
2. The charge of the court to the jury.²

Mr. William S. McLean (with him *Mr. Alfred Dart*, District Attorney), for the plaintiff in error:

1. By the terms of our offer we proposed to show that the only authority for the defendant to occupy the street, was by the consent of the borough council, and that that consent was evidenced by a resolution by the terms of which the defendant could occupy with its track only the centre of the street, and that, as matter of fact, the track for the distance of 75 or 100 feet diverged from the centre to the southerly side of the street. A railroad laid out over a highway so as to obstruct it, without express statutory authority or necessary implication, is liable to indictment for nuisance: *Dillon on Mun. Corp.*, § 561; *Commonwealth v. Railroad Co.*, 14 Gray 93; *Commonwealth v. Railroad Co.*, 27 Pa. 358.

2. The indictment at bar possesses all the requisite averments. It does not lack sufficient certainty. It contains a certain description of the offence with which the defendant is charged, and a statement of the facts by which it is constituted, so as to identify the accusation: *Commonwealth v. Boyer*, 1

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Binn. 207; Spangler v. Commonwealth, 3 Binn. 537; 4 Shars. Bl. Com., 301; Respublica v. Arnold, 3 Y. 420.

Mr. Allan H. Dickson (with him *Mr. Jos. D. Coons* and *Mr. John Lynch*), for the defendant in error :

1. The indictment charged that the defendant maintained a nuisance by unlawfully obstructing Railroad street. The nature of the accusation, to wit: the alleged variance between the line stated in the ordinance of 1866 and the line actually laid, was not stated. "The allegation in the bill ought to be certain to every intent, and without any intendment to the contrary. Hence, all indictments ought to charge a man with a particular offence, and not an offence in general:" Commonwealth v. Miller, 2 Pars. 480.

2. The track is in the centre of Railroad street down to where it debouches into the square. It then strikes across the square. Construed as claimed by the commonwealth, the company never had any right to cross this square at all. But there was no restriction preventing the company from getting on its own land off the street as soon as possible. Such a restriction would have been unreasonable, and hence void: Pittsburgh's App., 115 Pa. 4; Cleveland etc. R. Co. v. Speer, 56 Pa. 332; Klaer v. Ridgway, 86 Pa. 529; Phil., W. & B. R. Co. v. Williams, 54 Pa. 103; 2 Wood on Railways, 739.

OPINION, MR. JUSTICE GREEN:

At the time of the rejected offer of testimony the commonwealth had already given in evidence the map showing the location of the railway upon Railroad street, at the point in controversy, and this map and the location which appeared upon it were made part of the rejected offer. At the end of the offer, also, the nuisance complained of was defined as follows, viz.: "The nuisance consisting in so much of the track as diverges from the centre of the track to the southerly side thereof." The only manner in which it is claimed that the part of the track complained of was a nuisance at all, was in its not being laid in the centre of the street. It was not alleged nor offered to be proven that the structure of the track, or its position, in point of fact interfered with public travel in any respect. The alleged unlawful location of this

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small piece of connecting track, was the only element set up as establishing a nuisance at all. But it is very evident that this element is not established by any or all of the matters contained in the offer. The resolution of council, which it is said was violated, only provides that the track "shall be laid in the centre or middle of the said street, with a street rail *in such a manner* that wagons, sleighs, vehicles of every description can conveniently cross and re-cross said street without hindrance at any time and at any point," etc. A mere inspection of the map shows conclusively that if the track is properly laid as to its structure, it does not interfere with the public travel in any manner whatever. Its mere location cannot interfere in any degree with its being conveniently crossed and re-crossed. It is simply a continuation of the track of the railway, just as it is laid through the street, without any complaint of the manner of the structure. In addition to this the place in which this particular piece of track is laid is not Railroad street or any part of it. It is a wide open space formed by the intersection of five streets in which the individuality of each street is lost. The track is laid on the centre of Railroad street, up to the point at which that street enters the open space constituting the intersection of the several streets, and from that point the track is laid not upon Railroad street, but upon the open ground of the intersection. On the opposite side of this space where the track continues, there is a slight deflection from a straight line, to enter upon the private property of the company. But this cannot be regarded as in any sense a nuisance in itself, since the company has a necessary right to reach a track upon its own land as plainly as if it were a car house or a horse stable.

In the absence of any evidence, or any offer of proof, to show that the track complained of in fact interfered with the public travel, we are clearly of opinion that its mere location in the manner indicated on the map was not in any sense a violation of the resolution of council, and therefore not a nuisance.

Judgment affirmed.

W. H. HINDMARCH v. EDWARD HOFFMAN.

ERROR TO THE COURT OF COMMON PLEAS OF ERIE COUNTY.

Argued May 1, 1889—Decided June 28, 1889.

[To be reported.]

- (a) Savanack stole from Hindmarch, the plaintiff, a sum of money, \$400 of which he deposited with Hoffman, the defendant, to be returned to him or upon his order. The defendant did not know of the theft or that the plaintiff claimed the money, until so notified by the plaintiff's attorney, but after the notice he paid the money to the holder of an order from Savanack.
1. In such case, the duty of the defendant to hold the money for the plaintiff and, upon satisfactory proof of ownership, to pay it over to him, raised an implied promise so to do, and assumpsit for money had and received could be maintained.

Before PAXSON, C. J., STERRETT, WILLIAMS, McCOLLUM and MITCHELL, JJ.

No. 113 January Term 1889, Sup. Ct.; court below, No. 198 February Term 1887, C. P.

On March 2, 1887, a declaration in the common counts was filed in an action of assumpsit brought by William H. Hindmarch against Edward Hoffman, claiming the sum of \$400. The defendant pleaded non-assumpsit, with leave, etc.

By agreement in writing, the cause was submitted to the decision of the court, without a jury, under the act of April 22, 1874, P. L. 109, and on February 22, 1888, the court, GUNNISON, P. J., filed the following decision :

FINDINGS OF FACT.

On the morning of October 10, 1885, one Richard Savanack stole from the plaintiff, in Buffalo, N. Y., a sum of money, \$400 of which upon the same day he deposited with the defendant, to be returned to him or upon his order. There is no allegation that the defendant knew the money was stolen at the time, and as a fact I find he did not know it. He was afterwards notified by the attorney for the plaintiff that the plaintiff

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claimed the money, that it had been stolen from him by Savanack, and after this notice he paid it, upon the order of Savanack, to Messrs. Brundage, Weaver & Bell, of Buffalo, receiving from them a bond to indemnify him against any liability to any other person for the money. Upon his refusal afterwards to pay the amount to the plaintiff, this action in assumpsit was brought.

CONCLUSIONS OF LAW.

I have been unable to find any authority sustaining the right to maintain assumpsit in a case of this kind. The rules governing the action are well established, and require that there should be privity of contract, express or implied, between the parties, in order to maintain it: *Finney v. Finney*, 16 Pa. 380; *Wells v. Stewart*, 5 Binn. 325; *Allen v. Irwin*, 1 S. & R. 549. "To maintain assumpsit, privity of contract, either express or implied, is necessary. The mere fact of one man's money coming into the hands of another does not, in law, raise such an implied promise as will sustain an action therefor:" *Hoopes v. Stott*, 2 Chester Co. R. 40. "A plaintiff cannot waive a tort and proceed in assumpsit, except where there is a contract, either express or implied:" *Boyer v. Bullard*, 102 Pa. 555; *Bethlehem Bor. v. Perseverance Fire Co.*, 81 Pa. 445.

In this case there certainly was no express promise made by the defendant to pay the money deposited with him to the plaintiff. The express contract, on the contrary, was that he should repay it to Savanack, who deposited it with him. There being such an express promise, it cannot be said there was an implied promise to pay it to the plaintiff. Such a promise would be inconsistent with, and, if performed, would defeat the performance of the express promise to pay Savanack. It would be absurd to say such a promise could be implied in this case.

In each of the cases cited by the plaintiff's counsel as authority for this action, there was a promise either express or implied. In *Lee v. Gibbons*, 14 S. & R. 105; *Aycinena v. Peries*, 6 W. & S. 243; and *McCafferty v. Brady*, 19 W. N. 553, the opinions of the court show that the decisions were based upon express promises. In *McAllister v. Hoffman*, 16 S. & R. 147, and *Forscht v. Green*, 53 Pa. 138, the Supreme Court decided that money bet upon an election could be recovered by

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the person depositing it with the stakeholder if demanded before payment to the winner, on the ground that such a bet, being prohibited by law, there was an implied promise on the part of the stakeholder to repay the money to its legal owner. The case of *McCullough v. McCullough*, 14 Pa. 295, is not in point. It was there decided that "when one takes the personal property of another, the owner may waive the tort and maintain assumpsit for its value." But this action is not against the taker of the money. If it were against Savanack, the principle would apply. In that case the law would imply a promise to repay.

I am clearly of the opinion that the plaintiff cannot recover in this action.

And now, February 22, 1888, the prothonotary is directed to file this decision and give notice of its filing to the parties or their attorneys, and if no exceptions are filed hereto within thirty days after giving such notice, the prothonotary is directed to enter judgment hereon against the plaintiff and in favor of the defendant.

Exceptions filed by the plaintiff to the foregoing decision were subsequently dismissed, and judgment entered in favor of the defendant. The plaintiff thereupon took this writ, specifying that the court erred:

1. In deciding that the action of assumpsit could not be maintained upon the findings of fact stated in the decision.
2. In directing the entry of judgment in favor of the defendant, and in not entering judgment in favor of the plaintiff.

Mr. Theo. A. Lamb (with him *Mr. C. L. Baker*), for the plaintiff in error.

Submitting that the action of assumpsit could be maintained, and that the plaintiff was entitled to judgment, counsel cited: *Clarke v. Shee*, 1 Cowp. 197; *Mason v. Waite*, 17 Mass. 558; *Sergeant v. Stryker*, 1 Harr. (N. J.) 464 (32 Am. Dec. 404); 2 Greenl. Ev., 13th ed., §§ 102, 120; *McCullough v. McCullough*, 14 Pa. 295; *McAllister v. Hoffman*, 16 S. & R. 147; *Forscht v. Green*, 53 Pa. 188; *Rohm v. Borland*, 5 Cent. R. 562.

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Mr. S. M. Brainerd, for the defendant in error :

The cases cited by the court below sustain the conclusion that assumpsit would not lie. There was neither an express nor an implied promise to pay the money to plaintiff, and no privity of contract between the parties: 1 Chitty Pl., 99; Willet v. Willet, 3 W. 277.

OPINION, MR. JUSTICE STERRETT :

This case having been submitted for trial, without a jury, according to the provisions of the act of April 22, 1874, P. L. 109, the learned president of the Common Pleas found the facts substantially as follows :

On the morning of October 10, 1885, Richard Savanack stole from plaintiff, in Buffalo, N. Y., a large sum of money, four hundred dollars of which he afterwards, on the same day, deposited with defendant, to be returned to him or upon his order. When defendant received the money, he was ignorant of the fact that it had been stolen from plaintiff by Savanack, but, while it was still in his possession and under his control, he was notified of that fact by plaintiff's attorney, and that plaintiff claimed it as his property. Notwithstanding the notice, he afterwards paid the money, "upon the order of Savanack, to Messrs. Brundage, Weaver & Bell, of Buffalo, receiving from them a bond to indemnify him against any liability to any other person for the money." Afterwards, upon defendant's refusal to pay the amount to plaintiff, this action of assumpsit was brought to recover the same.

It does not appear to have been even questioned in the court below, that, upon the established facts, plaintiff had a good cause of action, but the learned judge was of opinion that he could not recover in the present form of action, and he accordingly entered judgment for defendant. His conclusions of law were duly excepted to, and they now constitute the specifications of error before us.

As found by the learned judge, the money sued for as money had and received by defendant to the use of plaintiff, never belonged to Savanack, nor could he have legally recovered any part of it. On the contrary, it was plaintiff's money, stolen from him by Savanack, and by the latter left with the defendant. While it was thus in his custody and under his control,

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he was fully informed of the theft, and also that plaintiff, as owner of the money, claimed it. Under these circumstances, it was clearly his duty to hold it for plaintiff, and, upon satisfactory proof of ownership, to pay it over to him. From the existence of that duty the law raised an implied promise by defendant to do so, but, in disregard of his duty in the premises, he paid it over, on the order of the thief, to parties who had no right whatever to receive it. Justice demands that he should now be compelled to pay the amount to the rightful owner, and there is no good reason why it should not be recovered in the present form of action.

In *Clarke v. Shee*, 1 Cowp. 197, it was held that case, for money had and received, will lie by the true owner of money against a third person into whose hands it came mala fide, provided its identity can be traced or ascertained. Referring to the form of action in that case, Lord MANSFIELD characterized it as "a liberal action in the nature of a bill in equity; and if, under the circumstances of the case, it appears that the defendant cannot in conscience retain what is the subject matter of it, the plaintiff may well support this action."

In 2 Greenl. Ev., 13 ed., §§ 102 and 120, the principle is thus stated: "Where the defendant is proven to have in his hands the money of plaintiff, which ex æquo et bono he ought to refund, the law conclusively presumes that he has promised to do so, and the jury are bound to find accordingly, and after verdict the promise is presumed to have been actually proved." "So, if money of the plaintiff has in any other manner come to the defendant's hands, for which he would be chargeable in tort, the plaintiff may waive the tort and bring assumpsit on the common counts."

Assumpsit was also sustained in *Mason v. Waite*, 17 Mass. 558, upon the following facts: Bank notes, done up in a package, were delivered by the owner to a carrier, who, without authority, paid them to a third party for a loss at a faro table. In an opinion sustaining a judgment in favor of the owner of the notes, against the party to whom they were thus paid, the chief justice, after remarking that trover would have been the better action but for the difficulty of identifying bank notes, said: "We do not see, however, why the action for money had and received will not lie. The notes were paid and received as

Syllabus.

money, and as to any want of privity or any implied promise, the law seems to be that where one has received money of another, and has not a right conscientiously to retain it, the law implies a promise that he will pay it over."

The defendant, in the case at bar, did not better his position by improperly handing over the money in question to those who had no right whatever to receive it, after he knew it had been stolen and that plaintiff was its true owner. The undisputed facts connected with his possession of the money, immediately before he parted with it, are quite sufficient to raise such an implied promise as will support assumpsit. We are therefore of opinion that the court erred in not entering judgment in favor of plaintiff for the amount claimed, viz.: four hundred dollars with interest from May 24, 1886, the time suit was commenced before the city recorder.

Judgment reversed and judgment is now entered in favor of the plaintiff and against the defendant for four hundred dollars with interest from May 24, 1886, and costs.

127	289
132	452
127	289
148	647
127	289
164	41

GEORGE MOORE v. W. O. COLT.

ERROR TO THE COURT OF COMMON PLEAS OF ERIE COUNTY.

Argued May 1, 1889—Decided June 28, 1889.

[To be reported.]

- (a) A contract under seal for the sale of an omnibus line provided:
- "And the party of the first part are not to engage in or use their influence in opposition to the party of the second part, in the passenger, mail or express business in any manner or form. And each party is hereby held and fully bound in the sum of \$300 for the faithful fulfillment of the above contract."
1. The last provision contemplated a penalty rather than stipulated damages, and, in an action for the breach of his covenant by the vendor in re-engaging in the same business, the vendee was entitled to recover the actual damages he had sustained.
 2. In such action, it was not error to admit testimony that defendant, in

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violation of his covenant, had carried a certain number of passengers, which at the regular rates amounted to a certain sum, as evidence of the damages to which plaintiff was entitled.

Before PAXSON, C. J., STERRETT, WILLIAMS, McCOLLUM and MITCHELL, JJ.

No. 406 January Term 1889, Sup. Ct. ; court below, No. 156 November Term 1885, C. P.

On March 24, 1886, W. O. Colt declared in covenant against George Moore, surviving R. G. Moore, charging the breach of a contract under seal dated May 1, 1880, whereby George and Robert Moore, trading as Moore Brothers, agreed to sell to William O. Colt their interest and good will in an omnibus business between Waterford and Waterford station, together with certain property, for the sum of \$150, payable in instalments, the contract containing the following clause:

“ And the party of the first part are not to engage in, or use their influence in opposition to the party of the second part, in the passenger, mail or express business in any manner or form. And each party is hereby held and fully bound in the sum of three hundred dollars for the faithful fulfilment of the above contract.”

The damages were laid at \$600. The defendant pleaded the general issue. •

At the trial on December 13, 1888, it appeared that in August, 1884, one S. E. Dewey obtained a contract from the Post Office Department for carrying the mails between Waterford borough and Waterford station, on the Philadelphia & Erie Railroad, and established an omnibus line to carry passengers and packages between said points. George Moore, the defendant, was employed by Dewey as manager of the line, at the wages of \$50 per month. Claiming that the employment of George Moore constituted a breach of his covenant, the plaintiff brought this suit.

William O. Colt, the plaintiff, testified that the defendant solicited passengers for his employer; sometimes he would carry five or six a day, sometimes fifteen or twenty; his name was painted on the omnibus as manager:

Q. What damage has Mr. Moore's breach of the contract been to you in carrying passengers and express matter between Waterford borough and Waterford station?

Charge of Court below.

Objected to, if it is to give a measure of damages to the jury.

By the court: Objection overruled, evidence admitted; exception.¹

Q. State the amount of it?

Objected to, as incompetent.

By the court: Objection overruled, evidence admitted; exception.¹

On cross-examination, the witness testified that he had kept a memorandum of the number of passengers carried by the defendant on each day.

At the close of the case on the testimony, the court, GUNNISON, P. J., charged the jury in part as follows:

[The counsel for the defendant asks the court to charge you that the limit of the damages that the plaintiff can sustain is the \$300 fixed in the agreement as a penalty, or as the sum in which each one became bound for the fulfilment of the contract. That is not the view the court takes of the contract. It is a question which is to be decided from a construction of the contract itself. The parties could make an agreement that in case of a violation by either party the party violating it should forfeit the sum of \$300 to the injured party; but that is a question to be determined by the contract itself and by its language. Now, the language of the contract itself is directly contrary to that theory. It says: "Each party is hereby held and firmly bound in the sum of three hundred dollars for the faithful performance of the above contract." That makes it a penalty; not as liquidated damages. A man who is appointed a tax collector and gives a bond in a penalty of \$1,000, conditioned for the faithful collection and accounting of the taxes, that is not the amount that he is bound to pay in case he violates his duty. If he collects \$2,000 of taxes and does not properly account for it, the officials of the county could recover from him the full \$2,000 notwithstanding the penalty in his bond was only \$1,000; and, if the penalty in his bond was \$1,000 and he collected all but \$500, all that they could recover from him would be the \$500. So in this case, the penalty is not the measure of damages. In these cases, in an action of covenant, you should give to the plaintiff the actual damages that he has sustained by reason of the violation of

Arguments.

the contract, if such a contract was actually delivered and consummated.

Now, on that subject the testimony does not entirely agree. The testimony of some of the witnesses is that the bus which the defendant drove went to the station at every train, and some of the witnesses say they took on an average some five or six passengers a day, and that the fare was fifteen cents for each passenger. I think the driver of the bus said it was fifteen cents without any round trip fares. It seems to have been the practice in Waterford to charge fifteen cents for a ride one way and twenty-five cents both ways, and the driver said when he drove the bus there were no round trip fares ; and he tells you, I think, that the number he carried averaged five or six each day each way, but he does not pretend to be accurate in that respect. He keeps no account of it and gives only his estimate, but that estimate is proper evidence. On the other hand, the plaintiff says that he kept an account of the amount of fares received by the defendant on each day during this time ; he don't know exactly what amount was received, but he says he knows the amount that he should have received from the passengers that he saw carried, and that the amount is \$580.

The measure of damage would be the amount that he suffered by reason of the violation of the contract, and the evidence of that amount would be the number of passengers that the defendant carried and the amount of fares that he would receive, so that that would be proper for you to consider in estimating the damages, if you find for the plaintiff.] ²

The jury returned a verdict in favor of the plaintiff for \$602.42. A rule for a new trial having been discharged, the defendant took this writ, assigning as error :

1. The admission of plaintiff's offers.¹
2. The portion of the charge included in [] ²

Mr. George A. Allen (with him *Mr. L. Rosenzweig*), for the plaintiff in error :

When this contract was made, the parties to it could see the difficulty in measuring the damages in case of any default ; and for this reason, we urge, the parties stipulated the sum of

Arguments.

\$300 as the amount to be paid, in case either one failed to comply with the contract. "When the damages are uncertain and not susceptible of ready ascertainment, and the sum fixed upon as damages is not unreasonable or unconscionable in view of the probable damage, and from the whole contract and the surrounding circumstances such appears to be the intention of the parties, such sum will be treated as liquidated damages; but, where the damages are certain and susceptible of ready ascertainment, or where the sum fixed upon is out of all proportion with the probable damages, it will be treated as a penalty:" Mayne on Damages, 1st Amer. ed. 303. The rule as stated has been applied by the courts: 2 Wait's Act. & Def., 439; Mathews v. Sharp, 99 Pa. 560; Cushing v. Drew, 97 Mass. 445; Pierce v. Fuller, 8 Mass., 223; Streeper v. Williams, 48 Pa. 450. Moreover, profits, as a measure of damage in case of a breach of a contract, are not favored in law; indeed, they are universally excluded, except when the profits are specifically stated in the contract as an item of damage contemplated, or are of the very essence of the contract.

Mr. E. L. Whittelsey, for the defendant in error:

1. One who violates his contract with another is liable for all the direct and proximate damages which result from the violation: *Wakeman v. Wheeler & Wilson Mfg. Co.*, 101 N. Y. 205 (54 Amer. R. 676). Losses sustained and gains prevented are proper elements of damage: *Westfall v. Mapes*, 3 Gr. 198. We aver that there was no difficulty in ascertaining the amount of damages sustained by the plaintiff. The amount was easily ascertained by the jury. The number of passengers carried and the amount of money received by the defendant, was peculiarly within his own knowledge; yet he neither testified himself in relation thereto, nor offered any evidence on the subject. It was not error to instruct the jury to make an estimate as best they could, under the evidence, as to what damage the plaintiff sustained: *Schlitz Brewing Co. v. McCann*, 118 Pa. 314.

2. Neither *Mathews v. Sharp*, 99 Pa. 560, nor *Streeper v. Williams*, 48 Pa. 450, is parallel with the case at bar. To be bound in a penalty is one thing, and to forfeit and pay is quite another. The language in our case is the language ordinarily

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used as to the penalty in a bond. "Stipulated damages can only be where there is a clear, unequivocal agreement, which stipulates for a certain sum as a liquidated satisfaction, fixed and agreed upon between the parties for doing or not doing certain acts particularly expressed in the agreement:" *Roberson v. Whitesides*, 16 S. & R. 320; *Burr v. Todd*, 41 Pa. 206. "I apprehend that it is rare in practice, in this state, to consider the sum mentioned for the purpose of enforcing an agreement in any other light than a penalty; so rare, that unequivocal indicia of intention to make it liquidated damages ought to be present, to induce courts to enforce it as such:" *Curry v. Larer*, 7 Pa. 470.

3. Moreover, the remedies on both sides, on non-performance, must be supposed mutual and equal: *Graham v. Bickham*, 2 Y. 32. Treating the \$300 as liquidated damages, suppose that Colt were in default and had refused to pay the sum he agreed to pay. If the theory of the defendant be correct, Colt could be compelled to pay just twice what he had engaged to pay. Our construction of the contract is a reasonable one. If the \$300 is regarded as a penalty, as contemplated by the parties, the rights of both are fully protected. If there is a breach of the conditions, and an action of covenant brought therefor, the plaintiff can recover the amount of the actual damages suffered, and the defendant could never, under any circumstances, be compelled to pay more: *Shreve v. Brereton*, 51 Pa. 175; *Merrill v. Merrill*, 15 Mass. 488; *Merchants Ins. Co. v. Algeo*, 31 Pa. 446; *Dick v. Gaskill*, 2 Wh. 184; *Perkins v. Lyman*, 11 Mass. 76.

OPINION, MR. CHIEF JUSTICE PAXSON:

The defendant below was clearly liable for his breach of the agreement of May 1, 1880. The only question is as to the amount of damages. The jury rendered a verdict against him for \$602.42. He now claims that the damages were liquidated by the article of agreement at the sum of \$300. The language of said agreement is as follows: "And each party is hereby held and fully bound in the sum of three hundred dollars for the faithful fulfilment of the above contract." If we interpret this contract by this language, we have the case of a penalty. It is in almost the exact terms of the ordinary penalty of a

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bond. There is no agreement "to forfeit," which in *Streeper v. Williams*, 48 Pa. 450, was held to be the equivalent of the words "to pay," and to be liquidated damages. In *Cushing v. Drew*, 97 Mass. 445, Cushing sold to Drew certain horses and wagons and the good-will of an express business in the town of W. for \$650, and agreed in writing not to do any express business, or cause any to be done in that town, so long as D. should do such business there, and in case he violated the agreement he was to pay D. \$900. This was held to be liquidated damages. Cushing stipulated to do a single thing, viz.: to abstain from interfering with the business of D., and if he failed in this he was to pay Drew the sum of \$900. It is difficult to see how any doubt could have arisen in that case.

The one in hand is not so clear. The parties have merely bound themselves in the sum of \$300 for the faithful fulfilment of their contract. That contract was that Moore (defendant below) agreed to sell to Colt (plaintiff below) all his interest and good-will in the "bus business" between the borough of Waterford and Waterford station, together with the "bus" and sleigh then in use by him, for the sum of \$150, with the stipulation that the said Moore should not engage in, or use his influence in opposition to Colt, in the passenger, mail, or express business in any manner or form; each to be held and fully bound as above stated in the sum of \$300. The nature of this stipulation, whether a penalty or liquidated damages, does not depend upon which party violates the agreement. Had the breach been by Colt, and he had refused to pay the \$150, what would have been the measure of damages in a suit against him by Moore? Would it have been the sum he agreed to pay—\$150 with interest, or would it have been the \$300 as liquidated damages? The latter proposition cannot well be maintained.

There is no class of cases which come before us more difficult to determine upon any settled rule than this. It was said by Mr. Justice AGNEW, in *Streeper v. Williams*, *supra*, at page 454: "Upon no question have courts doubted and differed more. It is unnecessary to examine the numerous authorities in detail, for they are neither uniform nor consistent. No definite rule to determine the question is furnished by them, each being determined more in direct reference to its own facts than to any general rule. In the earlier cases, the courts gave more

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weight to the language of the clause designating the sum as a penalty or as liquidated damages. The modern authorities attach greater importance to the meaning and intention of the parties. Yet the intention is not all controlling, for in some cases the subject-matter and surroundings of the contract will control the intention where equity absolutely demands it. A sum expressly stipulated as liquidated damages will be relieved from, if it is obviously to secure payment of another sum capable of being compensated by interest. On the other hand, a sum denominated a penalty or forfeiture, will be considered liquidated damages where it is fixed upon by the parties as the measure of the damages, because the nature of the case, the uncertainty of the proof, or the difficulty of reaching the damages by proof, have induced them to make the damages a subject of previous adjustment. . . . Upon the whole, the only general observation we can make is, that in such case we must look to the language of the contract, the intention of the parties as gathered from all its provisions, the subject of the contract and its surroundings, the ease or difficulty of measuring the breach in damages, and the sum stipulated, and from the whole gather the view which good conscience and equity ought to take of the case." This language is so appropriate that I trust it will justify the length of the quotation.

The defendant contends that the difficulty of ascertaining the damages is a reason why the case should be treated as one of liquidated damages. The jury, however, appear to have had no difficulty upon this head. The plaintiff proved that the defendant, in violation of his contract, had carried a certain number of passengers, which at the regular rates of fare amounted to the sum found by the jury. This was just so much money practically taken out of the plaintiff's pocket, and no good reason is apparent why he should not be compensated. The defendant has no equity which would constrain us to hold that language which technically provides a penalty shall be treated as liquidated damages. It is true the whole amount he received for the business, good-will, and property was only \$150. But this claim was for an interference with his business for over a year, and the direct loss to the plaintiff as found by the jury was largely in excess of the penalty. It can readily be seen that for such interference, continued for years, the sum of \$300 would not be an adequate compensation.

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In this view of the case we think the evidence referred to was properly admitted. It was not offered to prove speculative profits, but to show actual loss to the plaintiff. Nor do we find any error in that portion of the charge of the learned judge embraced in the remaining assignment.

Judgment affirmed.

LAKE SHORE & M. S. RY. CO. v. ALFRED FRANTZ.

ERROR TO THE COURT OF COMMON PLEAS OF ERIE COUNTY.

Argued May 3, 1889—Decided June 28, 1889.

- (a) A city street was crossed at right angles by the main tracks and sidings of the defendant company's railroad, the main tracks being north of two of the sidings. South of these tracks and sidings and separated from them about seven feet were the tracks and sidings of another railroad company. Safety-gates were maintained at the crossing, in obedience to a city ordinance.
- (b) About 7 A. M. the plaintiff and a companion, occupying and driving a two-horse wagon, approached the crossing from the south, but before driving over they stopped, looked and listened. The safety-gates were raised and no watchman was present. The south sidings of defendant's line were occupied in both directions by box cars, which obstructed the view of the main track.
- (c) While the two men were stopping and looking, a hand-car on one of defendant's main tracks passed eastward from behind the box cars, and they then drove across without again stopping to look and listen, and as they reached the main track they were struck by another hand-car passing rapidly on the same track in the same direction.
1. The foregoing facts appearing in the plaintiff's case, in his action for damages, it was proper that the question whether he was guilty of contributory negligence or not should be left to the jury, and it was not error to refuse to enter a judgment of compulsory nonsuit.
 2. The duty to stop, look and listen is absolute and imperative, and the fact that the safety-gates were raised did not release the plaintiff from its observance; yet, on the other hand, it was some evidence of negligence on the part of the defendant, and as such was a proper subject of the comments made thereon to the jury.
 3. The trial judge charged that the jury might consider the pain and suffering the plaintiff "has undergone, and may undergo in the future;" but the idea of compensation was fairly brought to their atten-

137	297
138	521

127	297
156	258

127	297
158	236

127	297
161	32

127	297
210	*101

127	297
32 SC	1 28

127	26
36 SC	*291

127	297
f222	561
e222	562
f224	*332

Statement of Facts.

tion in the enumeration of the elements of the damages allowable, and, taken with its context, there was no substantial error in the instruction.

Before PAXSON, C. J., STERRETT, WILLIAMS, McCOLLUM and MITCHELL, JJ.

No. 414 January Term 1889, Sup. Ct.; court below, No. 121 May Term 1885, C. P.

On March 18, 1885, Albert Frantz brought case against the Lake Shore & Michigan Southern Railway Company, to recover damages for personal injuries alleged to have been caused by the negligence of defendant company's employees. Issue.

At the trial on September 21, 1888, the facts shown by the plaintiff's testimony were in substance as follows :

Parade street, in the city of Erie, runs north and south, and is crossed at right angles and at grade by the tracks of the defendant company, to wit: two main and three side tracks, running east and west. Immediately south of the last track of the defendant, are the tracks of the Philadelphia & Erie Railroad, two or three in number. There is a space of seven feet and two inches between the south track of the defendant company and the north track of the P. & E. Railroad.

Safety-gates were maintained at the street-crossing, and at this point the tracks of both railroads are straight for a long distance. There was also a city ordinance in force, enacted June 24, 1873, prohibiting the running of railroad trains through the city at a speed greater than six miles an hour, and requiring companies to maintain flagmen at crossings.

About 7 A. M., November 21, 1884, Albert Frantz was riding with one Decknor who was driving north on Parade street in a two horse wagon. The safety-gates were raised, and the watchman was absent. When they approached the tracks of the P. & E. R. Co., they stopped the wagon and looked up and down and listened, to discover if it was safe to proceed. Two of the defendant company's side tracks were south of its main track, and at this time both of them were occupied in both directions with box cars standing upon them, and one of the box cars, on the siding next the main track, extended over the west sidewalk and into the street. These box cars, it was claimed, obstructed the view of the road-bed to the west of the crossing. The occupants of the wagon

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could see, however, that no train was approaching in that direction.

While the wagon was stopped and the plaintiff and his companion were looking and listening, a hand-car passed east on one of defendant's main tracks. Not seeing or hearing anything more, Decknor proceeded to drive across, the horses walking, and just as the team got upon defendant's south main track, another hand-car, also passing east, came rapidly and silently on, running at the rate of ten miles an hour, as was claimed, and dashed against the team. The horses jerked the wagon over the hand-car, whereby the driver was thrown out and the wagon upset. The team ran away, and the plaintiff was caught under the wagon box and dragged for some distance, receiving serious and permanent injuries.

The plaintiff having rested, the defendant moved that a judgment of compulsory nonsuit be entered.

By the court: I think this matter should go to the jury. The plaintiff himself testified that they stopped and looked and listened before going across the track, and the driver to the same thing, and that there were cars which obstructed the view until they got close to the track. The motion for a compulsory nonsuit is overruled; exception.¹

The testimony on the part of the defendant was to the effect that there were eight employees upon the second hand-car, the foreman and seven assistants; they testified substantially that they were running at the rate of about five miles an hour, when just before they reached Parade street they saw the horses and wagon coming at a smart trot; that they immediately gave what warning they could by shouting to the plaintiff and his companion in the wagon, put on the brakes and did their utmost to check the speed of the car and to stop it, and that when the car struck the horses it was going very slowly, almost stopped.

The court, GUNNISON, P. J., charged the jury and answered the points presented:

The first question for you to decide is, was there negligence on the part of the railroad company or its employees? Because if there was not, the plaintiff is not entitled to recover. His right to recover depends on the accident having been occa-

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sioned by the negligence of the railroad company or its employees.

It has been shown in evidence to you that there is an ordinance of the city of Erie which requires the railroad companies, at this street, to erect and maintain safety-gates. These gates should be operated and watched at all times when there is much travel across the tracks on the street. At such times, a neglect to operate the gates and lower them across the street when there are cars approaching, would be negligence on the part of the railroad company. Whether it was negligence in not having the gates so operated, at this time of day, depends on how much travel there was ordinarily across the tracks at that time. And that is a question for you to decide. I cannot say, that, as a matter of law, it was negligence in them not to have the gates in operation at that time. [If at that time there was a considerable amount of travel, then the fact that the gates were up would be notice to the plaintiff that there was no danger in crossing the track; it would be an invitation to him to cross the track. At the same time it would not excuse him from exercising due care in approaching and crossing the track and finding out whether or not there were approaching cars. Because the fact, if it is a fact, that the railroad company were negligent, would not excuse him for being negligent. He must use proper care in crossing, irrespective of the fact whether or not the railroad company used care.]³

It is also the duty of the employees of the company to give some warning of their approach, riding on a car, or of other employees of the company to give some warning of their approach, whether by lowering the gates, or by a watchman, or by crying out. The eight men on this car, or such as testify, tell you that they did halloo at the tops of their voices. The plaintiff tells you that he heard nothing of the kind, and Mr. Decknor says he heard nothing of the kind. And now it is for you to say whether they did give such warning, and whether that warning was sufficient to excuse them from any negligence, or relieve them from the imputation of negligence.

If you find that the employees of the railroad were guilty of negligence, it is your duty to inquire whether or not the plaintiff was negligent; for if he was guilty of negligence which contributed to the accident, he cannot recover, no matter how

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negligent the employees of the railroad company were. It was the duty of the plaintiff to use care in approaching the tracks, to stop and look and listen for approaching cars. It was also his duty to keep such lookout as was reasonable, while crossing the track, and avoid a car if he could, even after he had started to cross; and it was his duty that the horses should be driven in a careful and cautious manner. The plaintiff and the driver both say they crossed on a walk. The witnesses on the other side say they crossed on a smart trot, and that neither the plaintiff nor the driver was looking toward the west, and that they paid no attention to the warning given them by those on the car. These are circumstances for you to consider in determining whether or not the plaintiff was himself guilty of negligence.

If you find for the plaintiff on this point, and find that the railroad company were negligent, and that this accident resulted from their negligence, and that the plaintiff was guilty of no contributory negligence, it would be your duty to fix the amount of damages. In doing this you should take into consideration the expense of the plaintiff's sickness, although I think there has been no evidence given of the amount paid for medical attendance, etc. You do not know what that was. You should take into consideration the loss of wages he has suffered and will suffer during his life in consequence of this injury. Upon that point you have the testimony of witnesses who tell you how much he earned before the accident, and also the testimony as to how much he has been able to earn since the accident, and as to his disability to work now. In considering the amount, it is your duty to consider the probability of his life. Tables of mortality have been shown to you which show that at the age of 23, when he was injured, the probability of life was 40 years. It is claimed by the defendant that although the plaintiff was injured at the time of this accident, yet his present condition is not wholly the result of that injury, but partially the result of the other misfortune which he has had; this hunch on his back. And the testimony of the physicians as to whether or not this condition was produced by the injury or the hunch, is conflicting. You have only the right, in considering the damages you should award him, if anything, to consider the disability that resulted from this injury. If

Charge of Court below.

any part of the disability resulted from the other misfortune that he has, you cannot take that into consideration in fixing the damages. The defendant is only liable for the injury caused by its negligence, and for no disability caused by other causes. [You have also the right, in estimating the damages, to consider the pain and suffering that he has undergone and may undergo in the future.]⁵ Take all these matters into consideration, and I need not remind you that it would be improper in considering this case, to be influenced by any consideration of sympathy for the plaintiff or prejudice against the defendant, because it is a corporation.

The plaintiff requests the court to charge :

1. That if the jury find from the evidence that at the time of the accident the safety-gates at the Parade street crossing were up, and that no warning was given of the approach of the car, then the plaintiff had a right to presume that the track was clear; and, unless the jury are satisfied by affirmative evidence that the plaintiff was guilty of contributive negligence, the plaintiff is entitled to recover.

Answer: It was the duty of the employees of the railway company to give timely and sufficient warning of the approach to the street crossing. Whether or not in this case there was such warning is a question for the jury. I cannot say that the fact that the safety-gates were open, on the occasion of the passage of the hand-car, was per se negligence. If the jury find that there was no warning given at all, the plaintiff had a right to suppose that the track was clear, and if upon crossing the accident resulted from the negligence of the defendant's employees, without any contributory negligence upon the part of the plaintiff, he is entitled to recover in this suit.⁴

The defendant requests the court to charge :

1. It was the duty of the plaintiff to stop and look and listen, at a point where he could see the main tracks of defendant's railroad, and his failure to do so, his own evidence showing that there was such a point, the tracks running straight both west and east, constitutes contributory negligence on his part.

Answer: The plaintiff, about to cross the tracks of the defendant, was bound to stop, look and listen to discover whether or not there was danger in crossing, from approaching trains or

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cars. If he did not do so he was guilty of contributory negligence. If the jury find that upon the tracks near the crossing there were cars standing, obstructing the view of the defendant's main tracks, it becomes a question of fact for the jury to determine whether or not, on the occasion of this accident, he was guilty of contributory negligence.³

The jury returned a verdict in favor of the plaintiff for \$9,000. A rule for a new trial having been discharged, the plaintiff took this writ, assigning for error:

1. The refusal of defendant's motion for compulsory nonsuit.¹*
2. The answer to defendant's first point.²
3. The portion of the charge included in []³
4. The answer to plaintiff's first point.⁴
5. The portion of the charge included in []⁵

Mr. Wm. A. Galbraith, for the plaintiff in error:

1. On the showing of the plaintiff, there was no case for the jury. It was his duty to stop, look and listen before attempting to cross the tracks of the defendant's railroad. But he stopped at the tracks of the P. & E. Railroad, which are south of defendant's railroad. It was therefore error to instruct the jury that "the fact that the gates were up would be notice to the plaintiff that there was no danger in crossing the track; it would be an invitation to him to cross the track." The qualification, as to the necessity for his exercise of proper care, was not enough. The law recognizes but one rule as to this duty and that is that the person about to cross a railroad track must stop and look and listen; a failure to do so is negligence per se, and a question for the court and not for the jury: *Penn. R. Co. v. Beale*, 73 Pa. 504; *Penn. R. Co. v. Ackerman*, 74 Pa. 265; *McWilliams v. Keim*, 22 W. N. 372; *Collins v. Leafey*, 124 Pa. 203.

2. Ordinarily, the existence of negligence is a question for the jury, but when the facts are uncontroverted, their legal effect is a question of law for the court: *Del. etc. R. Co. v.*

* Is the refusal to order a compulsory nonsuit assignable as error? See *Bavington v. Railroad Co.*, 34 Pa. 358; *Pownall v. Steele*, 52 Pa. 446; *U. S. Telegraph Co. v. Wenger*, 55 Pa. 262; *Mobley v. Bruner*, 59 Pa. 481; *Lehman v. Kellerman*, 65 Pa. 489; *Ballentine v. White*, 77 Pa. 20; *Easton Borough v. Neff*, 102 Pa. 474.

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Cadow, 120 Pa. 559; Pittsb. & C. R. Co. v. McClurg, 56 Pa. 294; Erie City v. Magill, 101 Pa. 616. And it is to be especially noticed that there is a marked distinction between ordinary cases involving the questions of negligence and contributory negligence, and those arising from the rule as to the crossing of railroad tracks. This rule involves a determinate measure of duty, the same under all circumstances, and the compliance or non-compliance with it is for that reason for the court: Penn. R. Co. v. Peters, 116 Pa. 206. The instructions given as to what constitutes due care and caution, and what is meant by contributory negligence, were entirely too indefinite. The general effect of the charge was to diminish the force and importance of the rule, the value of which can hardly be overestimated. When a railroad company adopts safety-gates, or other appliances for the protection of the public, the public are not thereby absolved from the duty of taking care of themselves: Greenwood v. Railroad Co., 124 Pa. 572.

3. The settled rule, as laid down by this court in numerous cases, limits the damages to be given for prospective pain and suffering to compensation for such as are *likely* to be endured in the future, but in this case the jury was permitted to guess at what might possibly be so endured. "You have also the right, in estimating the damages, to consider the pain and suffering that he has undergone, and may undergo in the future." It is not enough to say that this error in the general charge was cured by the affirmative answer to the plaintiff's fourth point: Phila. & R. R. Co. v. Adams, 89 Pa. 31. In all the cases involving damages for personal injuries, the rule limiting the amount to actual compensation, including compensation for pain and suffering likely to be afterwards endured, has been constantly recognized, save where the injuries were the result of wilful misconduct amounting to gross negligence: Penn. R. Co. v. Allen, 53 Pa. 276. The rule universally accepted was well stated and followed in Scott Tp. v. Montgomery, 95 Pa. 444.

Mr. E. A. Walling (with him *Mr. C. M. Lynch* and *Mr. John P. Vincent*), for the defendant in error:

1. Where the evidence shows that the party injured did not stop and look and listen, there can be no recovery; but where

Arguments.

the evidence shows clearly, as in this case, that the plaintiff did stop and look and listen, before attempting to cross the defendant's tracks, it cannot be declared as matter of law that he was guilty of contributory negligence. At just what point a party should stop and look and listen, depends upon the varying circumstances of each case, and is a question for the jury: *North Penn. R. Co. v. Heileman*, 49 Pa. 60; *Penn. R. Co. v. Ogier*, 35 Pa. 60; *Arnold v. Railroad Co.*, 115 Pa. 185. No authority is cited to show that it is necessary to stop a second time to look and listen, and that, while crossing a set or system of tracks, as in this case. The contrary doctrine is expressly laid down: *Penn. R. Co. v. Garvey*, 108 Pa. 369; *Wharton on Neg.*, § 386.

2. The evidence in this case shows a still stronger case of negligence on the part of the defendant company than was shown in *McWilliams v. Keim*, 22 W. N. 372, in which the trial court ordered a compulsory nonsuit, and in so doing committed the same error which the defendant asked the court below to commit in this case. That it is negligence for a railroad company to approach a public crossing with its trains or cars without giving due and timely warning, is too well settled to require the citation of authorities. That it is negligence for a railroad company to have its tracks at a public crossing filled up with cars standing thereon, is shown by *Penn. R. Co. v. Ackerman*, 74 Pa. 265, and *Penn. R. Co. v. Horst*, 110 Pa. 226. But whether or not it is negligence not to have safety-gates at grade crossings in cities and towns: *Phil. & R. R. Co. v. Carr*, 99 Pa. 513, it is certainly powerful evidence of negligence to have safety-gates and then leave them open in the daytime when cars are passing.

3. The only criticism of the charge upon the subject of the damages suggested, is that in one sentence the word "may" is used where some of the cases use the words "is likely." But the words are practically synonymous and are used indiscriminately. In *Menges v. Muncy Creek Tp.*, 1 Penny. 179, the court used the word "may" in this connection. The judgment of the court below was affirmed in this court. Detached portions of the charge, and especially only a part of a sentence, should not be assigned for error: *Penn. R. Co. v. Coon*, 111 Pa. 430. Had the detached sentence been inaccurate, however,

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the court would not reverse the judgment for that: *Trego v. Pierce*, 119 Pa. 139. "Some substantial injury must have been the actual or probable result of such error, to justify us in disturbing the judgment."

OPINION, MR. JUSTICE MITCHELL:

The testimony on behalf of the plaintiff was to the effect that a public crossing in a city street was partially obstructed by standing cars: *Penna. R. Co. v. Ackerman*, 74 Pa. 265; *Penna. R. Co. v. Horst*, 110 Pa. 226; and this crossing, the view of which was thus obstructed, was approached by a hand-car at the rate of ten miles an hour, noiselessly, and without warning of any kind until the collision was imminent, and that the safety-gates which were there in accordance with the requirements of the city ordinances, were open, and thus tended to mislead the plaintiff. This evidence made a clear *prima facie* case of negligence for the jury. A nonsuit therefore could only be granted on the ground of manifest contributory negligence of the plaintiff. This we do not find. There were a number of tracks, and the evidence is strong that the plaintiff stopped, looked and listened before crossing the first. It might still have been his duty to stop again before going upon the track of the defendant company on which the collision took place, but the evidence does not enable us to say so as a matter of law. It is far from clear that the place where plaintiff stopped was not the best, or that there was any safe place for a second and better view. It was proper therefore that the case should be left to the jury, and the nonsuit was rightly refused.

For the same reasons the defendant's first point, which assumed as an established fact that "plaintiff's own evidence showed there was such a point," might have been refused entirely, and the qualified answer of the court did defendant no injury. The first and second assignments of error are therefore not sustained.

The third and fourth assignments have given us more trouble, and on these points this is a very close case. Portions of the charge and of the answer to plaintiff's first point, especially the phrases, "the fact that the gates were up would be notice to plaintiff that there was no danger in crossing the track; it

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would be an invitation to him to cross the track," and "if the jury find that there was no warning given at all, the plaintiff had a right to suppose that the track was clear," are certainly erroneous if applied to the plaintiff's conduct, or used in defining to the jury the standard of contributory negligence. The duty to stop, look and listen is absolute and unyielding. It is for the protection of the train and its occupants, as much or more than for that of travelers on the highway, and no amount of negligence on the part of the defendant can absolve the plaintiff from its obligation. The fact that the safety-gates were up did not and could not release the plaintiff from the necessity of observing the imperative rule for all railroad crossings. As said by the present Chief Justice in the closely similar case of *Greenwood v. Railroad Co.*, 124 Pa. 572, a plaintiff "has no right to omit the ordinary precautions when approaching a railroad crossing merely because he finds the gates up."

But while the fact that the gates were raised is no excuse for the failure of a plaintiff to stop, look and listen, yet on the other hand it is some evidence of negligence on the part of the defendant. Its tendency is certainly to give the approaching traveler the impression that the crossing is safe, and thereby to blunt the edge of his caution. It may of course be susceptible of full explanation. As said in *Greenwood v. Railroad Co.*, supra, "machinery of all kinds is liable to get out of order, and may do so just at the critical moment of the approach of a train." But unexplained it is evidence of negligence, and as such is a proper subject of comment in the charge of the court. The passages already quoted would be clearly erroneous as applied to the plaintiff's negligence, but they would equally clearly be correct if applied to the negligence of the defendant. They must be examined and judged in connection with their immediate context. The passage from the charge that the gates being up was an invitation to cross, follows immediately after a refusal to say that it was negligence in law, and a reference of it to the jury as a question of negligence in fact, and is followed in the same immediate connection by the qualification that "at the same time, it would not excuse him from exercising due care in approaching and crossing the track, and finding out whether or not there were ap-

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proaching cars ;” and what was meant by due care, is defined, a few sentences farther on, by the instruction that it “ was the duty of the plaintiff to use care in approaching the tracks, to stop and look and listen for approaching cars.”

The answer to the plaintiff's first point is very similar, and if regarded separately may also be taken as applied either to the plaintiff's or the defendant's conduct, but taken with its context it appears to apply to the defendant, and this is made entirely clear by the unqualified affirmance of defendant's third point, that the fact of the gates being open would not excuse the plaintiff from the duty of stopping to look and listen before attempting to cross.

Taking the passages as a whole, with what preceded and followed, though the distinction between what was meant to define the plaintiff's own duty, and what was said with reference to defendant's negligence, is not so clearly expressed as would be desirable, yet on a fair survey of the general effect we cannot say that it did not give the jury correct instruction as to the law.

The same course of remark is applicable to the portion of the charge relating to the damages. The fifth error complained of is the charge that the jury may consider the pain and suffering the plaintiff “ has undergone, and *may undergo* in the future.” The expression is not felicitous, and there is a notable absence throughout the charge of the word compensation, which should always be made prominent in cases of this class. See remarks on this subject in *Collins v. Leafey*, 124 Pa. 203. But the idea of compensation was clearly in the judge's mind and was fairly brought before the jury in the enumeration of the elements of the damages they should award if they should find for the plaintiff. These are stated by the learned judge in the general charge to be the expenses of plaintiff's sickness, the loss of wages he has suffered and will suffer, and the pain and suffering he “ has undergone and may undergo,” and in the answer to plaintiff's fourth point, where the pain and suffering are expressly limited to that “ already experienced, and likely to be yet experienced.” Taking all this together, the idea of compensation, though not made as distinct and prominent as is desirable, was fairly put before the jury, and it would be hypercritical and unjust to separate the single phrase “ may under-

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go" from its context, and say that it gave the jury an unbridled license in the ascertainment of the damages, or left them without any guide at all as in *Phila. & R. R. Co. v. Adams*, 89 Pa. 31, and *Collins v. Leafey*, 124 Pa. 203.

Though open to criticism in the several points reviewed, the charge as a whole contained no substantial error.

Judgment affirmed.

S. J. BENEDICT v. BOYD MARSH.

ERROR TO THE COURT OF COMMON PLEAS OF WARREN
COUNTY.

137 309
160 307

Argued May 8, 1889—Decided June 28, 1889.

[To be reported.]

1. Where, in determining whether an engine, boiler and machinery in a saw-mill upon land sold at sheriff's sale are part of the realty or not, the testimony as to the actual character of the structure, whether movable or permanent, is conflicting, the issue becomes a question of fact for the jury: *Harmony B. Ass'n v. Berger*, 99 Pa. 320.
2. In such case, should the jury be unable to find, from the conflicting testimony, that the mill was in fact a permanent structure, proof of the ante litem motam declarations of the owner and builder may be considered as evidence of his purpose at the time the mill was erected.

Before PAXSON, C. J., STERRETT, GREEN, CLARK and MITCHELL, JJ.

No. 221 January Term 1889, Sup. Ct.; court below, No. 24 December Term 1887, C. P.

On September 30, 1887, S. J. Benedict brought replevin against Boyd Marsh for certain saw-mill machinery of the value of \$1,107. The defendant pleaded non cepit, property in himself, with leave, etc.

At the trial on October 5, 1888, it was made to appear that in 1887 and prior thereto A. R. Kilburn was the owner of land on which he had erected a steam saw-mill. The structure was a

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building erected over a small stream of water, upon sills leveled by being sunk into the ground on each side of the stream. The engine was set on a block, imbedded in the ground and bolted to the sills. The boiler was placed near by on a stone foundation. A frame was made of 2×4 stuff, and covered with boards.

On January 26, 1887, Benedict obtained judgment against Kilburn, which became a lien upon the land on which the mill was erected. Execution was issued upon the judgment, and the land was sold on September 26, 1887, to Benedict. After the sheriff's sale, Boyd Marsh, the defendant, removed the engine, boiler and machinery from the mill and from the land, when Benedict brought this suit.

The defendant introduced testimony to show that on June 6, 1887, Kilburn, being in debt to Wm. L. Marsh, defendant's father, for \$1,000 borrowed money, transferred the mill to Marsh by bill of sale in writing, who then transferred it to the defendant. The two Marshes and Kilburn went to the mill and the defendant was put in possession.

N. J. Whitcomb called by defendant:

Defendant proposed to show by the witness that the witness and Mr. Kilburn, in December, 1885, went to Mr. Benedict (the plaintiff) and stated to him that he, Kilburn, wished to purchase a portable saw-mill, one that could be moved on to several tracts of land that he had, and from one to another, for the purpose of cutting timber, and that he purchased the mill in question for that purpose.

Objected to as incompetent and irrelevant.

By the court: Objection overruled; exception.¹

A. W. Day, a sawyer upon the mill, called by defendant:

Q. Did you have any conversation with Mr. Kilburn in the winter of 1886, as to what he was going to do with this mill after finishing the timber on the Flatt lot?

Objected to as incompetent and irrelevant.

By the court: Objection overruled; exception.²

The testimony of the witnesses admitted under these offers, appears in the opinion of the Supreme Court.

The court, BROWN, P. J., after stating the facts, charged the jury:

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The case then stands in this way: If the mill with its necessary equipments was personal property at the time Wm. L. Marsh bought it, then the judgment of Mr. Benedict was not a lien, and the verdict should be for the defendant. But, on the other hand, if the mill was a part of the real estate, then your verdict should be for the plaintiff. That is where the question is in this case. What was the character of the mill and its equipment? Was it a part of the real estate?

We say to you, as making a distinction between the owner of land and a tenant, if the owner of land erects a saw-mill on his own land as the evidence shows Mr. Kilburn did, the mill becomes real estate provided it is in its character a permanent structure. And by permanent we mean one whose character itself indicates permanency; when it is built in the manner in which persons building saw-mills usually build permanent mills; a structure that would be immovable without taking down and destroying its character as a mill. If, in this case, the structure was of such a permanent and substantial nature, it became real estate; and we say to you, that if in its character it is permanent, it cannot be changed by evidence showing that Mr. Kilburn, when he built it, intended to remove it from the tract when the timber on it should be exhausted. There are many structures in the way of manufacturing that probably it is intended at some indefinite time in the future to remove, when the material necessary to their operation has become exhausted. But that intention, we say to you, does not change the essential character of the property itself. The intention of Mr. Kilburn cannot affect it. It is the character of the mill itself for permanency that determines its character as realty. What was the character of the mill in this case? Was it a permanent structure? Was it of a character, like a portable mill upon wheels, that it could be moved, or was it in its nature permanent? If it was, we say to you that it was real estate, and the plaintiff is entitled to a verdict. We repeat, that the mere intention of Mr. Kilburn to remove it when the timber was exhausted, would not change the character of the mill itself.

The plaintiff requests the court to charge:

1. That the mill, being erected by Kilburn on the land owned by him, is presumed to be real estate.

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Answer: We say to you that this depends upon the question whether the mill was a permanent one; if it was a permanent structure, although Mr. Kilburn may have intended to remove it at some future time, it was real estate, notwithstanding the intention of Mr. Kilburn.

The defendant requests the court to charge:

1. The plaintiff, S. J. Benedict, cannot recover in this case unless the jury find from the evidence and believe that A. R. Kilburn intended that the boiler, engine, mill and machinery should be permanent and a part of his land.

Answer: We answer this point by saying, as we have said in the general charge, that the intention of A. R. Kilburn would not affect the question, if the building was a permanent building.

2. If the jury believe that the boiler, engine, mill and machinery were not intended by A. R. Kilburn to be permanent and a part of his land, the verdict should be for the defendant.

Answer: We answer this point by saying, that notwithstanding Mr. Kilburn may have intended the mill to remain only for a time when there was a supply of timber, yet if the building itself was a permanent structure, it was real estate. Otherwise, if it was not a permanent structure, not of a substantial, permanent kind, but in its character movable, then it would be personal property, and the verdict should be for the defendant.

3. If the jury believe that the mill and machinery was a mere temporary structure, to be again moved to other tracts, after the timber on the land upon which the mill was erected was exhausted, then it was personal property and the verdict should be for the defendant.

Answer: This point is affirmed in connection with the instructions that we have given you as to what constitutes a permanent structure.

4. If the jury believe that the mill and machinery was personal property, and not a fixture, the verdict should be for the defendant.

The jury returned a verdict in favor of the defendant. A rule for a new trial having been discharged, the plaintiff took this writ, assigning for error:

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1, 2. The admission of defendant's offers.^{1 2}

Mr. W. E. Rice (with him *Mr. R. Brown, Mr. C. W. Stone* and *Mr. H. E. Brown*), for the plaintiff in error:

That the machinery in a mill is real estate; that unless detached before sale it passes with the freehold by a sheriff's sale, are settled propositions: *Harlan v. Harlan*, 15 Pa. 507; *Harlan v. Harlan*, 20 Pa. 307. The only cases that hold that intention in any way affects the character of property, as personal or real estate, are where questions arise between landlord and tenant, concerning fixtures, as in *Seeger v. Pettit*, 77 Pa. 437, or where the structure is of such an equivocal character as to make the question depend upon intention, as in *Harmony Building Association v. Berger*, 99 Pa. 324. The saw-mill, in this case, was not of such equivocal character, and, therefore, evidence of intention should not have been admitted under the authority of the last above cited case.

Mr. W. W. Wilbur (with him *Mr. Wm. Schnur*), for the defendant in error:

Three witnesses on the part of the defendant testified that this mill was of a temporary character, portable and removable. Four witnesses on the part of the plaintiff testified that it was in character not portable but permanent. The mill was therefore of such an equivocal character as to raise a question for the jury, and in such cases the intention and the object the owner had in view in placing the mill on the land are material, physical attachment to the realty no longer being regarded: *Harmony Building Association v. Berger*, 99 Pa. 324; *Hill v. Sewald*, 53 Pa. 272; *Seeger v. Pettit*, 77 Pa. 437.

OPINION, MR. JUSTICE GREEN:

The only question in this case was whether the machinery in controversy was personalty or realty. The question was very fairly and correctly submitted by the court to the jury who found it to be personalty. There was conflicting evidence on the subject, and it is clear that the determination of the issue depended upon a question of fact which could only be decided by a jury.

The machinery in dispute was a certain steam engine and

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saw-mill machinery put up by one Kilburn on a tract of timber land belonging to him, and used in sawing logs cut from the land. Whether the engine and machinery were portable or permanent was the question. Kilburn, the owner, had treated it as personalty by selling it to William L. Marsh, by a written bill of sale, and the latter transferred it to his son, the defendant, before the sheriff's sale of the land, but after the plaintiff's judgment against Kilburn had been entered. There was considerable testimony that the engine and machinery were portable in their character and were intended to be moved from one tract of timber land to another, to cut up the logs on each. This brought the case within the catalogue of cases of an equivocal character which require the verdict of a jury to determine. In *Harmony Building Association v. Berger*, 99 Pa. 320, we said: "There may be some things which are so essentially a part of the freehold that as between vendor and vendee the intention of the owner may be of little weight. But this is not such a case. The articles themselves were of such an equivocal character as to raise a jury question." That was a case in which the articles in controversy were placed in position by the owner of the premises. As between landlord and tenant, the doctrine that physical annexation alone is the test has long been exploded: *Hill v. Sewald*, 53 Pa. 271; *Seeger v. Pettit*, 77 Pa. 437. In *Harmony Building Association v. Berger*, supra, we said further that "the object and intention of the owner is to be regarded in considering the character of the articles."

The learned court below was very careful to say to the jury that if the character of the mill for permanency was certain, the mere intention of Kilburn to the contrary could not change it and make the machinery personalty. But we think it quite clear upon the testimony that the character of the mill for permanency was a very debatable question, and that the intention and object of the owner became very material in determining the question. In this point of view the evidence offered and received under objection and exception was highly illustrative. Thus, the witness, A. W. Day, the tail-sawyer at the mill, testified under exception as follows: "Q. What kind of a mill was it? A. It was a movable mill. I suppose the engine and boiler hung together, but it was movable and intended to move

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it; that was their calculation after they cut their stock out there. Q. Did you have any conversation with Mr. Kilburn in the winter of '86 as to what he was going to do with this mill after finishing the timber on the Flatt lot? A. He said he was going to move it up to the State Line Run from there." Another witness, Whitcomb, had previously testified under objection and exception that he was the millwright who built the mill and was present with Benedict, the plaintiff, who sold the mill, and Kilburn who bought it, at the time of the sale. He was asked: "Q. State to the jury what took place there? A. He went and looked at this mill and decided on taking the saw-rig part, that is the saw-rig, carriage, and head blocks, and not the engine and boiler. Mr. Benedict wanted Kilburn to take the engine and boiler, but he said it was too heavy; he wanted a lighter rig and a portable boiler so he could move it. Mr. Kilburn said to Benedict that he had a small engine, that he would have it brought to his shop and overhaul it and if it needed any repairing he would repair it; and Mr. Kilburn wanted a new portable boiler. Q. What was said as to the character of the mill he wanted? A. He said he wanted a light rig that he could move; he said, over three different places; that he wanted to move it on different lots where there was timber to cut. Q. What did he say, if anything, about moving to different tracts of land where there was timber? A. He said he wanted to move it several times."

The foregoing is the testimony, the admission of which is complained of in the two assignments of error in this case. We see no error in its admission. It was directly upon the very point in controversy, and indicates with much force and directness the very purpose of the owner to put in portable machinery. It has the additional force of a communication of this purpose to the plaintiff himself and would be admissible for that reason. In view of the very conservative and cautious character of the charge of the court, it was not possible for the jury to be misled as to the precise question to be determined, and the considerations to be taken into account by them.

Judgment affirmed.

Statement of Facts.

NEW YORK ETC. R. CO. v. LAURA ENCHES.

ERROR TO THE COURT OF COMMON PLEAS OF WARREN
COUNTY.

Argued May 9, 1889—Decided June 28, 1889.

[To be reported.]

1. Where there is evidence tending to establish the existence of facts hypothetically stated in a point presented for instruction, the proponent has a right to a specific instruction upon the legal effect of those facts, and it is error to refer that legal effect to the jury.
- (a) In an action by a passenger to recover damages for personal injuries received while alighting from the defendant company's train, there was evidence that the plaintiff delayed leaving the car when the train stopped, and attempted to alight after the train started, though warned by the brakeman against it.
2. It was error in such case to refuse to charge, as requested, that "if the jury believe from the evidence that the plaintiff undertook to get off the train after it began to move, in disregard of the warning of the brakeman not to, she was guilty of contributory negligence and cannot recover."
3. Where the question of contributory negligence is fairly raised upon the evidence, it is not enough to charge generally that the plaintiff cannot recover, if guilty of contributory negligence: the court should explain to the jury what facts would constitute such negligence, in view of the testimony, and instruct the jury accordingly.

Before PAXSON, C. J., STERRETT, GREEN, CLARK and MITCHELL, JJ.

No. 40 January Term 1889, Sup. Ct.; court below, No. 40 December Term 1886, C. P.

On October 6, 1886, Laura Enches brought case against the New York, Lake Erie & Western Railroad Co., to recover damages for personal injuries charged to the negligence of the defendant company's employees. Issue.

At the trial on May 14, 1888, the case made, as was claimed, by the testimony on the part of the plaintiff, was as follows:

On August 21, 1886, the plaintiff with her mother took passage on a local train of the defendant company from Bear Lake, in Warren county, to Columbus, in the same county.

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When the train was approaching Columbus station, the call of the station was heard by the plaintiff, and she was also acquainted at the place. The plaintiff and her mother prepared to leave the train, and as soon as the train stopped they proceeded to alight, were hindered somewhat near the door by incoming passengers, but went out and down the steps of the car. The mother, being ahead, stepped off upon the platform safely, but when the plaintiff, following her, was on the last step of the car, the train was started with a sudden motion which threw the plaintiff across and upon the station platform, causing serious personal injuries. The stop of the train at the station was from half a minute to a minute.

The defendant introduced the testimony of a number of witnesses, to the effect that the stop at the station was for the usual time at that station; that there were several passengers, three or four at least, who had alighted, and the passengers waiting at the station had entered the cars, before the train started; that after the train began to move, the plaintiff and her mother came out on the forward platform of the ladies' car, the mother ahead and the plaintiff following close after, and the mother started down the steps; that the brakeman warned them not to try to get off, but to let him pass up and he would stop the train; that the ladies kept pressing their way down, and, finding they were about to jump, the brakeman assisted the mother to alight, and while he was so doing the plaintiff jumped and was thrown upon the platform.

The court, BROWN, P. J., after stating the facts, charged the jury:

The plaintiff bases her right to recover on the allegation of negligence on the part of the defendant, and the burden of proof is on her to sustain such allegation by the weight of evidence. If she has not done so she ought not to recover. If she has, then your verdict should be in her favor, unless it further appears that the plaintiff herself was also guilty of such negligence and want of care as essentially contributed to her injury. It is the law that, although the defendant may have been guilty of negligence and want of care in the management of its cars, yet if the jury are satisfied that the plaintiff was also negligent and careless, and with her negligence and care-

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lessness contributed in any degree to the injury, she cannot recover.

The first question for you to answer, from the evidence, is, were the employees of the defendant company guilty of negligence in the starting of the train, on which the plaintiff was a passenger and from which she was making her exit at the time of the accident? It is the duty of a railroad company, engaged in the business of the transportation of passengers, to conduct them safely, and to make stops of a sufficient length of time to enable the passengers, using due diligence and proper care, to alight with safety. The claim on the part of the plaintiff is that the defendant was guilty of negligence in this, that the train was not stopped a sufficient length of time to enable the plaintiff, with ordinary care and with reasonable expedition, to alight safely.

The law does not prescribe how long a train of cars shall be stopped to enable passengers to depart. The length of time must depend upon the particular circumstances of the case of which the jury are to judge. What would be negligence under given circumstances, might not be under others. Passengers alighting from a train at a station where a large number get on and off, should, manifestly, be given more time than those alighting at a station where only a few passengers get on and off.

The rule that we lay down for your guidance, is, that if the train at the time of the accident to the plaintiff, taking into consideration the number of persons to alight at Columbus station, and the number on the platform to take passage, stopped a sufficient length of time to enable the plaintiff, using reasonable care and reasonable expedition, to leave with safety, then the defendant is not chargeable with carelessness, and the plaintiff should not recover.

On the other hand, if, taking all the circumstances into account, such sufficient length of time was not given, then the defendant was guilty of carelessness; and, if the plaintiff, without fault on her part, sustained injury as the consequence of such carelessness, she is entitled to a verdict.

If you find that the plaintiff is entitled to a verdict, it will be your duty to ascertain what amount of damage in money will compensate her for such injuries and infirmities as the evi-

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dence shows is attributable to the want of care on the part of the employees of the railroad. . . .

The defendant requests the court to charge:

1. The plaintiff cannot recover unless the defendant was negligent in not stopping the train a sufficient length of time to enable her to get off safely, and the burden of proving such negligence is on the plaintiff.

Answer: Affirmed.

2. If the jury believe that the train was stopped a sufficient length of time to enable the plaintiff to get off, with a reasonable exercise of diligence on her part, there is no negligence to be attributed to the defendant, and the plaintiff is not entitled to recover.

Answer: Affirmed.

3. If the plaintiff was hindered by incoming passengers until the train started, it was her duty to remain on the train, and any attempt to get off after the train was in motion was at her own risk and peril.

Answer: Affirmed.

4. If the jury believe, from the evidence, that the plaintiff undertook to get off the train after it began to move, she is guilty of contributory negligence and cannot recover.

Answer: This point, as a legal proposition, applicable to the evidence in the case on trial, is refused; but we refer it to you to find, from the evidence, and taking all the circumstances into consideration, whether the plaintiff, in attempting to get off the train, was guilty of such negligence or want of care, as contributed to the injuries complained of; if she was, she is not entitled to recover.¹

5. If the jury believe that the plaintiff attempted to get off after the train was in motion, in disregard of the warning of the brakeman not to, she was guilty of negligence and cannot recover.

Answer: This point is refused, as applicable to the evidence in the case on trial; but if you find that the plaintiff attempted to get off the train after it was in motion, and if, taking all the circumstances into account, you find that this attempt was such an act of negligence and imprudence on her part as contributed to her injury, then she cannot recover.²

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The jury returned a verdict for the plaintiff for \$7,750. A rule for a new trial having been discharged, the defendant took this writ, specifying that the court erred, *inter alia* :

1, 2. In the answers to defendant's points.^{1 2}

3. In its general charge to the jury, by giving undue prominence to the plaintiff's allegations of the negligence of the defendant, and by obscuring or overlooking the contributory negligence of the plaintiff.

Mr. W. M. Lindsey (with him *Mr. F. P. Ray* and *Mr. J. O. Parmlee*), for the plaintiff in error:

The plaintiff's allegations of negligence on the part of the railroad company, are founded on two propositions, to wit: 1. That the train did not stop long enough for the plaintiff to alight. 2. That plaintiff was thrown from the car by an improper starting or jerk of the train. If the first proposition fails, they both fail and the plaintiff has no case.

1. If the train stopped a sufficient time for the plaintiff to alight, then it makes no difference how the train was started, or whether she was thrown off by the starting of the train or not. It was her duty to have been off the train, and if she was not, then she was guilty of negligence in being on the lower step of the car when the train started, and the second allegation cannot avail her: *McClintock v. Railroad Co.*, 21 W. N. 133. It is a fact that other passengers did get off, and if there was time for them there was time for the plaintiff. The getting on or off a moving train is *prima facie* negligence. The cases are numerous to this effect. We cite two: *Railroad Co. v. Aspell*, 23 Pa. 147; *McClintock v. Railroad Co.*, *supra*.

2. The defendant in the fourth point asked the court to instruct that if the jury believed from the evidence that the plaintiff undertook to get off the train after it began to move, she was guilty of contributory negligence and could not recover. There was a strong array of testimony on the part of the defendant that the plaintiff did get off the train after it was in motion. There was no evidence of facts which justified the act. The plaintiff denied it in toto. If the jury believed the defendant's testimony, the plaintiff was guilty of contributory negligence and the point should have been affirm-

Arguments.

ed: *Catawissa R. Co. v. Armstrong*, 52 Pa. 282; *Baker v. Fehr*, 97 Pa. 72; *Penna. R. Co. v. Zebe*, 33 Pa. 318. The defendant's fifth point was the same as the fourth, with the addition of the warning by the brakeman, testified to by several witnesses.

3. On the trial of the case, the defence was put largely upon the negligence of the plaintiff. The evidence on that question was not only strong, but seemed overwhelming, yet the learned judge, in his general charge, passed it by with a single reference. He seemed to overlook that branch of the defence. From the slight reference to the question of contributory negligence, in the general charge, and the prominence given to the question of the negligence of the defendant, there was not an adequate presentation of the defence: See *Schwenk v. Kehler*, 122 Pa. 67; *Bisbing v. Third N. Bank*, 93 Pa. 79.

Mr. Charles H. Noyes (with him *Mr. W. D. Hinckley*, *Mr. R. Brown*, *Mr. Charles W. Stone*, *Mr. H. E. Brown*, *Mr. W. E. Rice* and *Mr. A. F. Bole*), for the defendant in error:

1. The witnesses called for the railroad company did not contradict the plaintiff's proof that she used all diligence to descend from the train, and that it started before she could do so, and none of the facts testified to by them were inconsistent with the defendant's negligence; but if they were, the conflicting evidence was for the jury. The case of *McClintock v. Railroad Co.*, 21 W. N. 133, differs from this in the important feature that there the jury found that the train stopped long enough, and here they found that it did not. The facts were neither admitted, nor ascertained, but disputed. The question whether the plaintiff was negligent or not, was therefore purely a question for the jury. The burden of showing it was upon the defendant: *Hays v. Gallagher*, 72 Pa. 140; *Cleveland etc. R. Co. v. Rowan*, 66 Pa. 393.

2. The defendant's fourth point required the court to instruct the jury peremptorily that the plaintiff could not recover if she undertook to get off the train after it began to move, and the fifth merely added the warning of the brakeman. To have answered them affirmatively would have been to exclude from the jury all the other facts and circumstances in the case, and direct their attention exclusively to the question

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whether the plaintiff stepped from the train after it had begun to move, or was thrown off by the sudden starting of the train.

3. Assuming the defendant's contention, that the train was in motion when the plaintiff attempted to get off, the case of *Penn. R. Co. v. Kilgore*, 32 Pa. 292, is much like the present. Here, as in that case, the railroad company had involved the plaintiff in the attempt to get off. There, two children had preceded the plaintiff to the platform; here, it was her aged mother. In neither could it be charged that the mere alighting from the train, with or without warning, was negligence per se. The cases on this head are ably reviewed in *Filer v. N. Y. Cent. R. Co.*, 49 N. Y. 47 (10 Am. Rep. 327).

4. The points could not be affirmed, and no fair complaint can be made of the answers, which directed the attention of the jury to the proper question. Was the plaintiff, taking all the facts, and not merely those mentioned in the point, into account, negligent or imprudent? And the alleged negligence of the plaintiff was properly submitted in the general charge. The instruction that the plaintiff might recover if the defendant was negligent was everywhere qualified by the proviso, that the plaintiff herself was not in fault.

There is absolutely no ground whatever for the third assignment of error.

OPINION, MR. JUSTICE GREEN:

There was abundant evidence in the cause that the plaintiff got off the car after it had started and while it was in motion. In view of this testimony the defendant's fourth and fifth points were propounded to the court below. There was no evidence that there was any necessity, apparent or real, for the plaintiff to leave the car while it was in motion, and hence there was no occasion for a qualifying reservation as to the effect of her act of leaving the car while in motion, if the jury believed such to be the fact. We are clearly of opinion therefore that it was the duty of the learned court below to answer the points upon the facts of which they were predicated.

This being so, the simple question raised by the fourth point was, whether the plaintiff was guilty of contributory negligence if the jury believed from the evidence that she undertook to get off the train after it began to move. The mere fact of

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the accident proved that the motion of the car was sufficient to cause the accident from the attempt to leave the car after it started, and hence the hypothesis of the point was fairly presented in the very terms in which it was stated, and required a categorical answer. We have so often held that it is contributory negligence for a passenger to leave a car while it is in motion, that it is unnecessary to discuss that question: *Railroad v. Aspell*, 23 Pa. 147; *McClintock v. Penn. R. Co.*, 21 W. N. 133. There being nothing in the circumstances of this case to qualify the effect of the facts presented in the point, it should have been affirmed as it stood. The result of the qualified answer was to transfer from the court to the jury the disposition of the question as to the legal effect of certain facts hypothetically stated in the point, but warranted by sufficient testimony.

The same considerations are applicable in an increased degree to the answer given to the defendant's fifth point. There, the act of leaving the car while in motion and in disregard of the warning of the brakeman not to leave, was submitted to the court and was answered in the same manner as the fourth point was answered, by referring the whole legal effect of the facts supposed by the point to the jury. There was distinct affirmative evidence that such a warning had been given, but the court entirely ignored this feature of the point and said nothing about it in the answer. This was clear error. The answers to both these points were in reality not answers. They were mere directions to the jury that if the plaintiff was guilty of contributory negligence, in attempting to leave the car, she could not recover. Of course those instructions were legally true; but they were not instructions upon the effect of the particular facts hypothetically stated in the points, and hence were not responsive to the points in any sense. If there had been no evidence to support the hypotheses of the points, the error would have been immaterial; but there was such evidence, and the defendant had a right to a specific instruction upon the effect of the facts stated. The first and second assignments of error are sustained.

We are of opinion also that the third assignment is sustained. On the trial of such a case, it is the duty of the court to explain to the jury what would constitute contributory negli-

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gence of the plaintiff, and then to instruct them that if they found such facts in the case, the plaintiff could not recover if the accident resulted wholly or in part from such contributory negligence. It is not enough to say, generally, to the jury that a plaintiff cannot recover if he or she has been guilty of contributory negligence. The jury must be enlightened as to what facts would constitute such negligence in view of the testimony, otherwise they have no guide by which to regulate their action, in determining the controverted facts. In the present case, there was no definition or statement of any kind as to what was the meaning of contributory negligence, or as to what kind of facts would constitute it or even tend to prove it. There is but one sentence in the charge on that subject, and that is a mere general statement of the rule of law that a plaintiff who has been guilty of contributory negligence cannot recover. All the rest of the charge is upon the alleged negligence of the defendant and the question of damages, and under the whole charge and the answers to the points the jury were without any instructions either upon the meaning of the term "contributory negligence," or upon the question as to whether there were any facts in evidence either proving or tending to prove that there was contributory negligence in the case. We have frequently held that such charges are misleading and therefore erroneous. The third assignment is sustained. The fourth and fifth assignments are not sustained.

Judgment reversed, and new venire awarded.

FIRST N. BANK v. JOHN M. FAIR.

ERROR TO THE COURT OF COMMON PLEAS OF WARREN COUNTY.

Argued May 9, 1889—Decided June 28, 1889.

[To be reported.]

1. An averment in a statement of claim that a certain payment made by a third person, was made to apply on a particular judgment and should have been credited thereon, if unaccompanied by any allegation of an agreement or direction for such application, is no more than an expression of opinion, and is insufficient to support a claim depending upon an alleged right in the plaintiff to the allowance of such credit.

Statement of Facts.

2. Where the plaintiff in a judgment, without fraud or deceit, and through a voluntary payment made by the sheriff out of the proceeds of a judicial sale, receives the amount appearing to be due by the record of the judgment, which is more than the sum actually remaining due thereon, but not more than enough to extinguish the indebtedness of the defendant to him, he has a right to apply the excess to indebtedness other than the judgment.
3. A person who, after the entry of a judgment and before a sheriff's sale of real estate thereunder, purchased the land from the defendant in the judgment, has no higher rights against the judgment plaintiff than the latter: if the defendant may not recover from the plaintiff money collected by means of an execution and sheriff's sale of the land upon which the judgment was a lien, neither can such purchaser.

Before PAXSON, C. J., STERRETT, GREEN, CLARK and MITCHELL, JJ.

No. 165 January Term 1889, Sup. Ct.; court below, No. 93 December Term 1887, C. P.

On June 1, 1887, on an appeal from the judgment of a justice of the peace, in an action brought by John M. Fair against the First National Bank of Warren, the plaintiff filed his statement of claim, setting forth that the defendant bank had held a judgment for \$625, entered in the Court of Common Pleas of Warren county, against Frank O'Connor and Edward Reid; that this judgment was given to secure six notes, aggregating \$625, which said bank had discounted for O'Connor and Reid, and it was a lien upon a certain tract of land in said county; that subsequent to its entry the plaintiff purchased said land from O'Connor and Reid, and paid the full purchase price thereof, in ignorance of the existence of this lien; that before the issuing of the execution mentioned below, O'Connor and Reid had paid to the bank "\$300, which was to apply on the said judgment," paying off three of the notes to secure which the judgment was given, "and which should have been credited on said judgment, as of the dates the same were paid," but that no credit was ever entered on the judgment for said \$300; that subsequently an execution was issued on said judgment and the land purchased by Fair from O'Connor and Reid was levied on and sold as the property of the latter; that at the time of the sale there remained due to the bank upon the judgment, as debt and interest, the sum of \$335 only, but the bank received from the sheriff the sum of \$461.35, the balance

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of proceeds of sale after paying costs, of which balance the sum of \$126.35 belonged to the plaintiff Fair, "who was the owner of said land, subject to what was justly due on said judgment;" that no claim for this was made at the time by plaintiff, because he was unaware that anything had been paid on the judgment, but, as soon as he learned of the payment of the \$300 above mentioned, he demanded of the bank the sum of \$126.35, and interest thereon, payment of which was refused.

An affidavit of defence made by the cashier of the defendant bank and filed, averred that the money paid to the defendant by the sheriff, and claimed by the plaintiff, "was made by the said sheriff upon lawful process, issued from this court against Frank O'Connor and Edward Reid for that purpose, and paid to the defendant by the said sheriff; that the said money was received by the said defendant upon the indebtedness to it from said O'Connor and Reid, and that the same did not pay all their indebtedness to said bank, but there was still a balance due it from them, which has been paid since by indorsers."

A rule taken for judgment for want of a sufficient affidavit of defence, was made absolute, November 17, 1888, BROWN, P. J., delivering the opinion:

The defendant had a judgment against O'Connor and Reid. After the entry of the judgment the plaintiff purchased from O'Connor and Reid certain real estate on which defendant's judgment was a lien, but in ignorance of that fact he paid the full amount of the purchase money. The defendant issued execution on its judgment, by virtue of which said real estate was sold, and the proceeds paid to defendant.

The plaintiff alleges that at the time of the sheriff's sale he did not know that anything had been paid on defendant's judgment against O'Connor and Reid, and hence did not make any demand on the sheriff for the amount of the proceeds of sale belonging to him; that afterwards he learned that O'Connor and Reid had paid the defendant on its judgment the sum of \$300 which had not been credited; that of the proceeds of the sale of the said real estate the defendant received the sum of \$461.35, when it was only entitled to \$335; that for the dif-

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ference of \$126.35 he made demand on defendant for payment which was refused.

The statement of plaintiff's claim sets forth in substance the facts recited, and the affidavit does not deny them. It does not deny the allegation in plaintiff's statement that the defendant had received from the proceeds of the sheriff's sale \$126.35 more than was due on its judgment, but asserts that the money was received on the indebtedness to it of O'Connor and Reid, and that it did not pay all their indebtedness, "but there was still a balance due it from them, which has been since paid by indorsers." We think the affidavit is insufficient, and the rule to show cause why judgment should be entered against defendant is made absolute.

Judgment having been entered in favor of the plaintiff for \$159.62, the defendant took this writ, specifying that the court erred :

1. In entering judgment against the defendant for want of a sufficient affidavit of defence.
2. In holding that the plaintiff could recover upon the cause of action set forth in his statement.

Mr. D. I. Ball (with him *Mr. C. C. Thompson*), for the plaintiff in error :

There are three reasons why the judgment should be reversed : (1) The money sued for was collected by process of law and applied on the indebtedness of the bank against the parties as whose property the money was made and paid over, without any fraud, and therefore it cannot be recovered back : *Federal Ins. Co. v. Robinson*, 82 Pa. 359 ; *Herring v. Adams*, 5 W. & S. 461 ; *Mann's App.*, 1 Pa. 29 ; *Boas v. Updegrove*, 5 Pa. 516. (2) Even if recoverable, the money must be sued for by the sheriff who paid it, and not by this plaintiff : *Longenecker v. Zeigler*, 1 W. 252 ; *Finnel v. Brew*, 81 Pa. 365. (3) The justice had no jurisdiction. There being neither privity nor contractual relation between the bank and Mr. Fair, his rights against it, if he have any, do not arise from contract, and his remedy is case, of which the justice does not have jurisdiction : *Schaffer v. McNamee*, 13 S. & R. 44 ; *Zeigler v. Gram*, 13 S. & R. 103. It is due to the court below to say that this question of jurisdiction was overlooked there.

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Mr. Geo. H. Higgins (with him *Mr. O. C. Allen*), for the defendant in error :

1. The cases cited by the defendant to sustain his first proposition are not like the case at bar. They are cases in which the rights of the parties had been adjudicated and where the rights of third persons had not intervened. Fair was guilty of no laches. The bank knew that Fair had bought this land and paid full value for it, for this is not denied in the affidavit of defence. It purposely refrained from entering the proper credits on the judgment, proceeded to enforce it as if all unpaid, and under it took Fair's money. On what principles of justice, honesty and fair dealing is it to be allowed to keep it?

2. The proposition that the action must be in the sheriff's name is not supported by the cases cited for the bank. On the contrary, *Longenecker v. Zeigler* decides that the action may be brought by the person entitled to receive the money. Fair does not occupy the same position that O'Connor and Reid would, for the reason that they knew, and he did not, that the \$300 had been paid on the judgment.

3. Assumpsit for money had and received is the proper remedy in such a case as this : *Longenecker v. Zeigler*, 1 W. 252; *McDonald v. Todd*, 1 Gr. 17; *Miller v. Ord*, 2 Binn. 382; *Barr v. Craig*, 2 Dall. 151; *Haldane v. Duche*, 2 Dall. 176. It is based upon an implied contract, needing no privity other than the fact of one person's having money which *ex æquo et bono* belongs to another : 1 Bouv. Law Dict. 356; *Moses v. Macferlan*, 2 Burr. 1008; *Ex parte Ford*, 16 Q. B. D. 307. A justice of the peace has jurisdiction of such a cause of action : Act of March 20, 1810, 5 Sm. L. 161.

OPINION, MR. JUSTICE GREEN :

Upon the facts set forth in the plaintiff's statement and defendant's affidavit of defence, we are of opinion that the plaintiff is not entitled to judgment. The plaintiff's statement does not aver that the defendant knew that Fair had bought the land of O'Connor and Reid and paid the full value of it, and therefore he has no right to the inference of such a fact from the omission of the defendant to deny it. As the affidavit of defence avers that the money was received by the bank upon the indebtedness to it from O'Connor and Reid, and that

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it was not sufficient to pay all of said indebtedness, and that the balance of the indebtedness was subsequently paid by indorsers of O'Connor and Reid, it is difficult if not impossible to discover any element of mala fides on the part of the bank in receiving and retaining the whole amount of the money paid to them by the sheriff. The bank held a judgment against O'Connor and Reid for \$625, to secure the payment of notes to that amount. Three hundred dollars, being for three of the notes, had been paid to the bank by O'Connor and Reid. The plaintiff's statement alleges that the \$300 "was to apply on the said judgment," but it does not allege that the bank had agreed to so apply it, or that O'Connor and Reid had made any such application of it, when the money was paid. Without such an averment the statement that the \$300 "was to apply on the said judgment" is nothing more than the expression of the affiant's opinion to that effect. The same is true of the allegation that the amount "should have been credited on said judgment."

The case then is, that, without any averment of a special application of the money paid to the extinguishment of the judgment pro tanto, by either of the parties to the judgment, the plaintiff in the judgment having issued execution thereon and sold the real estate of the defendants therein, the sheriff voluntarily paid to the plaintiff, out of the proceeds in his hands, a sum sufficient to satisfy the judgment as it stood of record. This amount was in excess of the amount which would have been due, if the \$300 paid by the defendants in the judgment previously, had been credited on the judgment when paid, or at any time after, but was not enough to pay the whole amount of the indebtedness due by the defendants to the plaintiff. Clearly, as between the defendants and the bank, the latter had the legal, as well as the moral, right to retain the whole amount of the money received, for it would be no more than a debtor to the defendants for the amount of the excess, and this indebtedness it would have a right to apply to the remaining indebtedness due by the defendants to the bank. Indeed it would be a grave question whether the bank might not be required to make such application by the indorsers of the other paper held by the bank.

This being so, how does it become unconscionable for the

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bank to retain the money? The defendants in the judgment owed it to the bank, and so far as appears on the record of this case they make no objection to this action of the bank. If the bank owed no duty to return the money to the defendants in the judgment, how do they owe such a duty to Fair, who claims title to the land under the defendants? He was a voluntary purchaser from the defendants. The judgment of the bank was at that time a lien on the property purchased, ostensibly for its whole amount, and Fair took the title with full record notice of the judgment for its whole amount. The bank owed him no duty of information. If he failed to know of the judgment, it was his own fault for which he cannot hold the bank responsible in any manner whatever. He had ample opportunity to intervene and assert any rights he may have had as a purchaser before the sheriff's sale, but he did not see fit to do so. He allowed the sale to proceed and the purchase-money to be paid over to the bank without objection, and after all this has been done and the bank has simply received money made by lawful process of execution, and which as against its judgment debtors, the defendants in the execution, it had a perfect right to retain, he brings an action against the bank to recover for himself the money so received. We know of no principle of law or morals upon which a recovery can be had in such circumstances, and we are referred to no authority which has ever sanctioned it.

Judgment reversed, and procedendo awarded.

IN RE LICENSE TO C. M. CARLSON.

IN RE LICENSE TO A. J. TUTTLE.

CERTIORARIS TO THE COURT OF QUARTER SESSIONS OF ERIE COUNTY.

Argued May 11, 1889—Decided June 28, 1889.

[To be reported.]

Upon a writ of certiorari to the order of the Court of Quarter Sessions revoking a license to sell liquors, under § 7, act of May 19, 1887, P. L.

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- 110, neither the testimony nor the opinion of the court below form any part of the record which may be considered.
2. The agreement of counsel that the testimony may be omitted from the paper book, and that the finding of facts as contained in the opinion of the court below should be considered in lieu thereof by the Supreme Court, is nugatory.
 3. In such proceeding, the provision of the section is mandatory, and it will be presumed that the court below had sufficient evidence before it to show that the licensee had violated some law of the commonwealth in regard to the sale of liquor.
 4. On a proceeding to revoke a license to sell liquors under said section, on the ground that the licensee sold liquors to minors, it is no sufficient excuse or justification that he sold to them in good faith, informed and believing that they were of full age.

Before PAXSON, C. J., STERRETT, GREEN, CLARK and MITCHELL, JJ.

Nos. 200, 201 July Term 1888, Sup. Ct.; court below, Nos. 36, 37 May Term 1888, Q. S.

At May Term 1888, of the Court of Quarter Sessions of Erie county, Louis Marz and George Gehrlein were convicted of burglary. During their trial they set up the defence that they were intoxicated at the time the crime was committed, and testified that they were minors, and that one of them, Marz, got beer at A. J. Tuttle's saloon, and both drank at Carlson's. Carlson and Tuttle had each been granted a license to sell liquors at retail under the act of May 13, 1887, P. L. 108. The court at once, May 26, 1888, entered a rule upon both Carlson and Tuttle to show cause why their respective licenses should not be revoked, returnable May 29, 1888.

On June 26, 1888, the court, GUNNISON, P. J., filed the following opinion :

CARLSON'S LICENSE.

The act of May 13, 1887, § 7, P. L. 110, provides that "upon sufficient cause being shown, or proof being made to the said court, that the party holding a license has violated any law of this commonwealth relating to the sale of liquors, the Court of Quarter Sessions shall, upon notice being given to the person so licensed, revoke the said license."

Upon the trial of Commonwealth v. Marz and Gehrlein at the May Sessions of the court, it appearing from the testimony

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that C. M. Carlson, the respondent in this rule, had sold beer to minors, this rule was entered, notice given him, and a hearing had at which the testimony of witnesses for and against the rule was heard. If that testimony showed a violation of the law on the part of the respondent, the portion of the section quoted makes it mandatory upon the court to make this rule absolute.

The respondent was sworn, and admitted in his testimony, that he sold beer to the two minors in question. His excuse was that their appearance indicated that they were of full age; and that as a precaution before selling he asked their age, and each responded that he was of full age; that he sold to them in good faith, fully believing them to be of full age.

It may be conceded that the weight of the evidence is to the effect that he was ignorant of the fact that the boys were minors, and that he did not wilfully violate the law; and, if ignorance of fact, or the absence of intention to violate the law, will avail as an excuse, the rule should be discharged.

By § 17, of the act of 1887, it is enacted, "That it shall not be lawful for any person, with or without license, to furnish by sale, gift or otherwise" "any spirituous, vinous, malt or brewed liquors" "at any time to a minor," etc. Under a literal reading of the section, there was undoubtedly a violation in this case. The act of selling, irrespective of intention, constitutes an offence under a strict construction of the language used by the legislature.

Ignorance of fact is, in many cases, admitted as an excuse, as showing the absence of a criminal intention. In other cases, the rule is different. The distinction is thus laid down by Greenleaf: "The rule" (i. e., that ignorance of fact will excuse), "would seem to hold good, in all cases where the act, if done knowingly, would be *malum in se*. But where a statute commands that an act be done or omitted, which in the absence of such statute might have been done or omitted without culpability, ignorance of the fact or state of things contemplated by the statute, it seems, will not excuse its violation. Thus, for example, where the law enacts the forfeiture of a ship having smuggled goods on board, and such goods are secreted on board by some of the crew, the owners and officers being alike innocently ignorant of the fact, yet the forfeiture

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is incurred, notwithstanding their ignorance. Such is also the case in regard to many other fiscal, police, and other laws and regulations, for the mere violation of which, irrespective of the motives or knowledge of the party, certain penalties are enacted; for the law, in these cases, seems to bind the party to know the facts, and to obey the law, at his peril: "3 Greenl. Ev., § 21. Measured by this standard, it would seem that ignorance as to the age of the persons to whom the liquor was sold, was no excuse. The law is of the class recited by Professor Greenleaf, in which such a rule obtains.

That the legislature intended the mere fact of selling to a minor to constitute the offence, irrespective of intention or good faith, is, I think, apparent upon a review of its legislation upon this subject. The act of May 8, 1854, § 1, P. L. 663, enacted "that wilfully furnishing intoxicating drinks by sale, gift or otherwise" "to a minor" "shall be held and deemed a misdemeanor," etc. By the second section of the act of April 17, 1867, P. L. 89, it was enacted that "no person shall sell, give away, or dispose of any strong or spirituous liquors, wines, ale, beer, or any intoxicating drinks to" "any person under twenty-one years of age" without the consent of parent or guardian, etc. By the eleventh section of the act of April 12, 1875, P. L. 42, it was enacted "that it shall not be lawful for any person, with or without license, to sell," etc., "at any time to a minor." And lastly, by § 17 of the act of May 13, 1887, P. L. 113, it was enacted "that it shall not be lawful for any person, with or without license, to furnish by sale, gift or otherwise" "any spirituous, vinous, malt or brewed liquors" "at any time to a minor."

It will be seen that by the act of 1854, a necessary element to constitute the offence, was that the sale should be wilful. By each of the succeeding acts cited, the sale is made unlawful, the word "wilfully" being omitted, and no other word of similar import being used. This change must have been intentional. Whether or not the act of 1854 was, upon experience, found to permit too easy an opportunity for evading the law, it is not necessary to inquire. The succeeding legislation effected a change, by which the question of good faith and criminal intention became unimportant in determining the question as to whether or not there had been a violation of the

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law. Sales to minors whether wilfully or ignorantly are equally prohibited. It follows that, the law having been violated, it becomes the clear duty of the court to revoke the license in this case.

The rule to show cause is made absolute. [Exception.]

TUTTLE'S LICENSE.

The facts in this case are similar to those in the rule to show cause why the license of C. M. Carlson should not be revoked. For the reasons given in the opinion filed in that case, the rule to show cause in this case is made absolute. [Exception.]

Thereupon the respondents severally took these writs assigning the orders of the court making the rules absolute as error.

On March 27, 1889, it was agreed by counsel in writing that, "As no notes of testimony were taken at the hearings of the above cases except the notes taken by the court; and as the facts proven are clearly set forth and stated in the opinion of the court filed in the case of C. M. Carlson, No. 36 May Sessions 1888, it is agreed that said notes of the testimony taken by the court may be omitted from the paper books of appellant, using instead the findings of facts as stated in said opinion of the court."

Mr. J. Ross Thompson and *Mr. E. P. Gould*, for the plaintiffs in error.

Mr. A. E. Sisson, District Attorney, for the commonwealth.

OPINION, MR. CHIEF JUSTICE PAXSON :

We are asked to review the action of the Court of Quarter Sessions in each of the above cases, in revoking the license of the plaintiffs in error to sell liquor. The records have been brought here upon writs of certiorari, and we can only review what appears upon their face. The seventh section of the act of May 13, 1887, P. L. 110, provides that "upon sufficient cause being shown, or proof being made to the said court, that the party holding a license has violated any law of this commonwealth relating to the sale of liquors, the Court of Quarter Sessions shall, upon notice being given to the person so

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licensed, revoke the said license." This provision is mandatory, and upon this writ we must presume the court below had sufficient evidence before it to show that each of the plaintiffs in error had violated some law of this commonwealth in regard to the sale of liquor. What particular law had been violated the record does not show, as neither the testimony nor the opinion of the court form any part of it. The agreement of counsel of March 27, 1889, that the testimony may be omitted from the paper book, and that the findings of fact as contained in the opinion of the court should be considered in lieu thereof, is nugatory, as we would have no right to consider the testimony if printed.

If we look into the opinion of the court for the facts, however, we find nothing to help the plaintiffs. From it we learn that the offence of which the plaintiffs in error were guilty, was that of selling liquor to minors, and that the only excuse offered was that they did not know the persons to whom they sold were minors. This ignorance is not a sufficient excuse or justification under the act of assembly. If such a defence could be successfully interposed in such cases, there would be few convictions, and the law would be nullified for all practical purposes. Speaking for myself, I regret that the act of assembly does not make it a criminal offence for a minor to obtain liquor from a licensed dealer upon the pretence that he is of full age.* As the law now stands it is an offence to sell a person a glass of liquor the day before he is twenty-one years of age; yet it is often difficult for a saloon keeper to know the age of the person who may call for a drink. Some persons are as mature in appearance at twenty, as others are at twenty-two. While I would rigidly enforce the license laws, yet the dealer who pays for his license and sells by authority of law is entitled to some consideration. I would hold him to a strict compliance with the law; at the same time I would protect him in so far as he honestly attempts to comply with it, and would punish the individual who, by a falsehood, induces him to violate it.

We see no sufficient reason to disturb the action of the court below.

The proceedings are affirmed in each case.

* See act of May 10, 1881, P. L. 12.

CHARLOTTE FURNACE CO. v. CYRUS STOUFFER.

ERROR TO THE COURT OF COMMON PLEAS OF FAYETTE
COUNTY.

Argued May 15, 1889—Decided June 28, 1889.

[To be reported.]

1. Replevin will lie for an inclined plane connecting a railroad with defendant's ore mines, and located partly on land belonging to defendant, which was built by the plaintiff under an agreement that the defendant should have the use of it for a certain compensation during a determinate period, and which at the expiration of the period the defendant refused to deliver to the plaintiff.
2. An agreement to pay a compensation for the use of a structure erected upon land, being *prima facie* inconsistent with ownership thereof by the person so agreeing, is evidence against him of a title to the structure in the person who is to receive the compensation, even though, as to the land occupied, the latter were tenant and the former landlord.

Before PAXSON, C. J., GREEN, CLARK, WILLIAMS and McCOLLUM, JJ.

No. 345 January Term 1889, Sup. Ct.; court below, No. 113 June Term 1885, C. P.

On March 31, 1885, the Charlotte Furnace Co. brought replevin against Cyrus Stouffer, to recover a certain inclined plane and its appurtenances, located at Mt. Vernon. The defendant pleaded non cepit and property in himself.

At the trial on February 14, 1888, the plaintiff put in evidence the following written proposition and acceptance:

"I agree to deliver the Charlotte Furnace Co. three thousand (3000) tons of ore at rate of fifteen (15) tons per day at mouth of pit formerly worked by me, and placed conveniently for loading on cars of incline, which is to be built and operated by them. The price of this ore to be two and fifty one hundredths dollars (\$2.50) per ton of 2240 lbs. as weighed on the scales of the Greenlick Narrow Gauge Railway Co., and payment to be made from 15th to 20th of each month for previous month's shipments. Twenty cents (20c.) per ton of the above-named (\$2.50) to be retained by them and paid to J. R. Stouf-

Statement of Facts.

fer, his receipts to be acknowledged as payments for such amount. It is also understood that in case I mine more ore than the quantity above specified, I have the privilege of selling excess amount to other parties, after giving Charlotte Furnace Co. opportunity of purchasing at the same price offered by such parties, and I further agree to pay 5c. per ton for use of incline and tramway on all ore that may be sold to other parties than Charlotte Furnace Co., for the term of four years from this date, and cash advances for labor are to be made on ore at dump, when shipments have not been made as above specified.

CYRUS STOUFFER.

Accepted, CHARLOTTE FURNACE COMPANY,

By G. K. MILES.

Mt. Vernon, Pa., March 5, 1881."

The plaintiff then adduced evidence to the effect that the incline and tramway referred to in this proposition, extending between the Greenlick Narrow Gauge Railway and an ore pit mouth belonging to the defendant, was built by the plaintiff company in 1881, at its expense, and was operated by it while shipping the 3000 tons of ore mentioned in the agreement, the delivery of which was completed in April, 1882; that during the remainder of the four years mentioned in the agreement the defendant operated it; that on March 30, 1885, an agent of the plaintiff went to take possession of and remove the inclined plane, when the defendant claimed the ownership of it and refused to let plaintiff take it away. The next day this action was brought.

A witness for plaintiff testified that about four fifths of the plane was located on land belonging to D. H. Pershing, and the remainder on land of the defendant; that Pershing was back and forth about the mines while the plane was being built, never objected to its construction upon his land, and furnished to the plaintiff a part of the lumber required for it; also that the defendant was present frequently and made a suggestion as to a change of location with a view to convenience in operation.

The plaintiff put in evidence an agreement between D. H. Pershing and Everson, Knapp & Co. dated September 8, 1874, "for the purpose of showing the right of the plaintiff company over the property of D. H. Pershing," and presented some tes-

Arguments.

timony in relation to an assignment of this agreement to the plaintiff made by Everson, Macrum & Co. Neither the agreement nor the assignment was printed in the paper books. There was also testimony to the effect that the defendant had obtained a lease from Pershing subsequent to the building of the incline and tramway, under which he operated a stone quarry, with which he connected the incline, though the plaintiff notified him not to use the incline for that purpose. This lease to the plaintiff was not printed in the paper books.

At the conclusion of the plaintiff's testimony, the court, EWING, J., on motion, entered a judgment of compulsory nonsuit. A motion to take off the nonsuit was subsequently refused, "the court being of the opinion that the property, for the recovery of which this action was brought, as shown by the evidence of the plaintiff, is not such property as that for which an action of replevin can be sustained." Exception.

The plaintiff then took this writ, assigning for error the refusal of the court to vacate the judgment of nonsuit.

Mr. S. L. Mestrezat, for the plaintiff in error:

The court held this property to be a fixture, that the relation of landlord and tenant existed between the parties, and that the plaintiff, as tenant, had no right to remove the fixture after the expiration of the tenancy.

1. The agreement created no tenancy, but was a hiring by the defendant for a certain time, at a certain sum, of the personal property of the plaintiff: *Hill v. Sewald*, 53 Pa. 271. Plaintiff could not remove before the time expired without a breach of the contract of hiring: *Wheeler v. Train*, 3 Pick. 255; *Collins v. Evans*, 15 Pick. 63.

2. At least four fifths of the incline was on land not belonging to defendant. As to this, defendant can on no pretence claim to be the plaintiff's landlord, and there is nothing in the contract making this incline which the plaintiff had built, at its expense, the property of the defendant, or giving him more than a right to hold and use it until March 5, 1885. The parties regarded the property as personalty, and not as a fixture, and their intention becomes the law of the case: 2 *Smith's Leading Cases*, 8th Am. ed. 244, and cases there cited.

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3. The title being thus in the plaintiff, the defendant's failure to deliver up the property, as requested, after the expiration of the time for which it was hired, subjected him to an action of trover or replevin, as plaintiff might elect: *Russell v. Richards*, 10 Me. 429 (25 Am. Dec. 254); *Osgood v. Howard*, 6 Greenl. 452; *Dame v. Dame*, 38 N. H. 429 (75 Am. Dec. 195); *Badger v. Phinney*, 15 Mass. 359; *Weaver v. Lawrence*, 1 Dall. 156; *Harlan v. Harlan*, 15 Pa. 507; *Green v. Ashland Iron Co.*, 62 Pa. 97.

Mr. R. H. Lindsey (with him *Mr. Geo. D. Howell*), for the defendant in error:

1. The plaintiff does not contend that the incline and its connections are not, per se, fixtures. The decisions on this point are too uniform and consistent to admit of question: *Ege v. Kille*, 84 Pa. 333; *Voorhis v. Freeman*, 2 W. & S. 118; *Quimly v. Manhattan Co.*, 24 N. J. Eq. 260; *Hoskins v. Woodward*, 45 Pa. 42; *Pyle v. Pennock*, 2 W. & S. 390; *Ewell on Fixtures*, 214; *Rogers v. Gilinger*, 30 Pa. 185. Replevin will not lie for a fixture, unless severed from the freehold: *Roberts v. Dauphin Deposit Bank*, 19 Pa. 71. There is here no claim of any severance, and the statement that the parties regarded this as personal property is a pure assumption, unsustained by any testimony.

2. Plaintiff's argument does not fully state the grounds on which the court below ruled the case. The court first sustained defendant's position that the incline became by attachment a part of his freehold. Plaintiff then shifted its ground and claimed to be a tenant under the contract, and as such to have the right to remove fixtures. To this it was replied that the failure to remove during the four years term would avoid the right of removal, a position fully sustained by *Overton v. Williston*, 31 Pa. 155; *White v. Arndt*, 1 Wh. 91; *Darrah v. Baird*, 101 Pa. 272. The allegation that part of the incline was on land leased from Pershing is of no importance. It clearly appears that this was leased by defendant, and plaintiff was his sub-tenant. The contract and the conduct of the parties fairly show the intention to be that defendant was to become the owner of the incline at the end of four years.

Opinion of the Court.

OPINION, MR. JUSTICE GREEN:

The nonsuit ordered in this case can only be sustained upon the theory that the plaintiff's testimony showed such an interest of the defendant in the inclined plane, to recover which the action was brought, as to deprive the plaintiff of any right of recovery therefor. After a repeated and most thorough reading of the testimony, we fail to discover such evidence. By the terms of the contract between the plaintiff and defendant the plaintiff was to build the plane at its own expense and the testimony shows this was done. It was further agreed that the defendant was to deliver the ore conveniently for loading on cars of the incline, which was to be operated by the plaintiff. It was also agreed that if more ore than 3000 tons was mined, the defendant should have the privilege of selling the excess to other parties, and in that event he was to pay five cents per ton to the plaintiff for the use of the incline and tramway for the term of four years. This contract is the only written evidence as to the relation of the parties to the incline and tramway, and so far as it goes it certainly is altogether inconsistent with any ownership of the defendant therein. If the defendant was to pay the plaintiff for the privilege of using it, the structure cannot be regarded as having been considered by the parties as belonging to the defendant, but precisely the opposite.

In point of fact, Stouffer used the incline to ship ore during the whole of the four years after the 3000 tons were shipped, and it is to be presumed he paid the contract price for the privilege, though there is a singular lack of testimony on this subject. After the four years expired the plaintiff undertook to take possession of the structure, but the defendant refused to allow this to be done, and hence this suit. The defendant now claims title to the structure, and in support of his claim alleges that he became owner by virtue of the right which a landlord succeeds to, when a tenant voluntarily erects fixtures on the leased premises and leaves them there when he leaves the premises. Even that right is subject to an exception in favor of trade fixtures, but in this case we fail entirely to discover the relation of landlord and tenant between these parties. There was evidence that the incline was erected principally on land of D. H. Pershing, and that Pershing had made an article

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of agreement in relation to the use of the land with Everson, Knapp & Co., who had assigned the agreement to the plaintiff. We are not permitted to know the contents of this paper because it is not printed and does not appear on the record, and yet we are expected to pronounce upon it. If the case of the plaintiffs in this court depended upon the contents of this paper, we would be obliged to decide against them for want of knowledge of the paper, but as they have a *prima facie* case without it, and the paper does not purport to confer any right upon the defendant, it is not so material in that regard. The defendant however has shown no title to the land upon which the incline was built, so far as we can discover, and no relation of landlord and tenant as between him and the plaintiff.

The agreement to pay for the use of the incline is inconsistent with any ownership therein on his part, even if he were landlord, and as he had a right to the possession and use of the incline during the four years, no inference of an abandonment of it to him arises from the fact that the plaintiff was out of possession at the time its claim was made. The case was incompletely tried. There was an absence of evidence which ought to be in it. Only the plaintiff's testimony was heard. The agreement made by Pershing, though given in evidence, is not printed. An alleged lease to Stouffer is referred to, but was never given in evidence and of course we know nothing about it. It is very plain to us that it was error to order a nonsuit upon the state of the record as it comes to this court.

Judgment reversed, and new venire awarded.

L. E. SMITH v. B. J. TUIT.

ERROR TO THE COURT OF COMMON PLEAS OF FAYETTE
COUNTY.

Argued May 15, 1889—Decided June 28, 1889.

[To be reported.]

1. A paper in the form of a will, devising real estate expressly in consideration of and as compensation for specific services to be rendered

127	341
137	40

127	341
20	SC 49

127	341
204	315

127	341
398	C218

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by the devisee, may operate as a memorandum of a contract for the sale of land sufficient to comply with the statute of frauds, and as such be admissible in evidence during the lifetime of the testator.

2. Such paper, without evidence of anything done under it by the devisee, cannot be treated as anything more than a will, revocable at the mere pleasure of the testator; but when the testator has put the devisee in possession of the land devised, and the latter has fully complied with his part of the agreement, the devise loses its revocability and must be treated as an executed contract.
3. If such instrument contain a provision that the devisee shall have possession of the land devised during the lifetime of the testator, and in pursuance of this provision the devisee obtain possession thereof and faithfully perform the specified conditions, he cannot be ousted from the land even by the testator, but has vested in him a right of possession sufficient to defeat ejectment brought by the testator or his grantee.

Before PAXSON, C. J., GREEN, CLARK, WILLIAMS and McCOLLUM, JJ.

No. 374 January Term 1889, Sup. Ct.; court below, No. 137 June Term 1886, C. P.

On April 5, 1886, Belford J. Tuit brought ejectment against Laura E. Smith for a certain house and lot in New Salem, Pa. The defendant pleaded, not guilty.

At the trial on October 8, 1888, before EWING, J., the plaintiff offered in evidence a deed to himself from Sarah Smith, under whom both parties claimed, dated August 29, 1885, conveying the property in dispute, and rested.

The defendant then offered in evidence the following paper:

"The last Will and Testament of Sarah Smith, of the township of Menallen, in the County of Fayette, State of Pennsylvania: I, Sarah Smith, considering the uncertainty of this mortal life and being of sound mind and memory do make and publish this my last will and testament in manner and form following:

"First. It is my will that all my just debts and funeral expenses, including good, decent tombstones, together with the proving of this my last will and testament, be first paid by my executor hereinafter named out of my estate.

"Second. I will and bequeath to Laura E. Smith all my real and personal property of whatsoever kind or nature, including house and lot that I purchased of William M. Jones in town of New Salem, adjoining lands of Jacob Allamon, Caleb Antram

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and others. I desire that the above described property, after the settlement of all my just debts, heretofore mentioned, shall be for his kindness and care toward me in sickness and in health, in watchfulness and care during all my natural life, and at my decease the aforesaid property shall belong to the said Laura E. Smith, his heirs or assigns with all rights, liberties and hereditaments, forever and forever.

"Third. It is my will and desire that the said Laura E. Smith have possession of my house on first day of November, 1884, and he take me with him and that he take care of me as one of his own family.

"And lastly, as to all the rest, residue and remainder of my personal estate, goods and chattels of what kind and nature soever, I give and bequeath the same to Laura E. Smith, his heirs or assigns forever, hereby revoking all former wills by me at any time made.

"Lastly, I do hereby nominate and appoint George W. Hess executor of this my last will and testament. In witness whereof I have hereunto affixed my hand and seal this 31st day of October, A. D. 1884.

SARAH SMITH. [SEAL.]

"Signed, sealed and published by Sarah Smith to be her last will and testament in the presence of us who at her request and in her presence have subscribed our names as witnesses thereto.

ELIAS HATFIELD.

GEORGE W. HESS."

Defendant's counsel: "Now, we offer this paper, being a written declaration of Sarah E. Smith, to be followed by evidence that under this paper and in pursuance of it the defendant in this case took possession of the property now in dispute and is still there, and that Sarah Smith herself moved into the premises with him in pursuance of the intention stated in this paper and there remained for a long time, and that the defendant has at all times performed his part of the agreement indicated in this paper. Of course it all goes together. We don't offer this paper alone. This paper as a will would have no significance at all, but we offer the paper as the declaration of the plaintiff's grantor showing that she had agreed that her title should pass from her at her death, the paper being executory."

The entire offer was objected to as incompetent and irrele-

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vant. Sarah Smith, the testatrix in the foregoing paper was alive and in the court room at the time of the offer.

By the court: Objection sustained, offer refused; exception.²

The defendant offering no further testimony, the court instructed the jury that under the evidence their verdict should be for the plaintiff.

The jury returned a verdict for the plaintiff as directed. A rule for a new trial having been discharged, judgment was entered, when the defendant took this writ, assigning as error:

2. The refusal of defendant's offer.²

Mr. Edward Campbell (with him *Mr. Geo. D. Howell* and *Mr. E. H. Reppert*), for the plaintiff in error:

1. An agreement to devise land, in consideration of a covenant to support the devisor during life, followed by the execution of such a will, vests an equitable title in the devisee. Such an instrument is not revocable like an ordinary will, but is to be deemed a contract in writing within the statute of frauds, which equity may treat as creative of an estate in the devisee: *Johnson v. McCue*, 34 Pa. 180; 1 Redf. on Wills, *174, *175, n. 27; 1 Jarm. on Wills, *26; 1 Redf. on Wills, *169, *170, n. 21; *Frederick's App.*, 52 Pa. 341; *Perry v. Scott*, 51 Pa. 119; *Turner v. Scott*, 51 Pa. 126-134; *Rowan's App.*, 25 Pa. 292; *Lant's App.*, 95 Pa. 279. Such a devise is an executed contract, on condition to take effect at the time specified, transferring the legal estate, and not a mere equity requiring to be perfected by another instrument: *McCue v. Johnston*, 25 Pa. 306.

2. No express form of words is necessary to make a contract for the sale of land. Any memorandum in writing indicative of the intent of the parties, and so precise as to enable the land to be conveyed, and the consideration and manner of its payment to be ascertained, is a sufficient contract in writing to be enforced specifically: *Colt v. Selden*, 5 W. 525; *Sage v. McGuire*, 4 W. & S. 229; *McFarson's App.*, 11 Pa. 503; *Parish v. Koons*, 1 Pars. 91; *Grove v. Hodges*, 55 Pa. 504. Such contract may be evidenced by a will made in pursuance of it: *Brinker v. Brinker*, 7 Pa. 53. The signature by the party seeking to enforce the contract is unnecessary: *Lowry v. Mehaffy*,

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10 W. 387; Tripp v. Bishop, 56 Pa. 424; Johnston v. Cowan, 59 Pa. 275; Cadwalader v. App, 81 Pa. 194; McFarson's App., 11 Pa. 503; Shoofstall v. Adams, 2 Gr. 209; Simpson v. Breckenridge, 32 Pa. 287; Smith's App., 69 Pa. 474; Wilson v. Clarke, 1 W. & S. 554, 558; Worrall v. Munn, 5 N. Y. 229 (55 Am. Dec. 330); Smith on Contracts, 7th ed., *96; Grove v. Hodges, 55 Pa. 504.

Mr. A. D. Boyd (with him *Mr. P. S. Morrow* and *Mr. D. M. Hertzog*), for the defendant in error:

1. The refusal to admit in evidence the will of Sarah Smith was proper for the reason that she was still alive, of sound mind and present in court. The rejection of the will, with the proposal to follow it by the offer of evidence set out in the second assignment of error, was proper, because the offer did not present such a contract as would, if so proved, sustain a decree of specific performance by a court of equity. It is not such an executory contract as those referred to in *Lowry v. Mehaffy*, 10 W. 387; *Tripp v. Bishop*, 56 Pa. 424, and other like cases cited by plaintiff in error, in all of which the grantor bound himself by covenant to complete the grant by some future conveyance. The offer here, proposed to show no such agreement on the part of Sarah Smith. Her direction, by will, to whom her title should pass at her death, was revocable at any time: *Rowan's App.*, 25 Pa. 292; the facts of which are quite similar to the present case.

2. The will was avoided, as to this property, by the deed subsequently executed and delivered to Tuit. The cases of *McCue v. Johnston*, 25 Pa. 106, and *Johnson v. McCue*, 34 Pa. 180, do not apply, because there two writings were executed at the same time; a will signed by the owner of the land devised, and an agreement to pay an annual sum to the devisor, signed by the devisee, which two papers the court construed together as forming one contract. This disposes of the written contract as presented in the offer. Moreover, the offer did not present such a verbal contract as would be specifically enforceable. Two essentials were lacking: (a) It did not show that defendant took exclusive possession of the premises; it proposed to show that Sarah Smith herself moved into them with him. (b) It did not show such performance by defend-

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ant as could not be compensated in damages. It was therefore insufficient: Moyer's App., 105 Pa. 432, and cases there cited. The facts of that case are so nearly identical with this one, that we rest our case upon it.

OPINION, MR. JUSTICE GREEN:

By the terms of the paper called the last will and testament of Sarah Smith she devises all her estate, real and personal, to Laura E. Smith, and expressly states that she does so for the kindness and care toward her in sickness and in health, "and care during all my natural life." She adds that it is her desire that Smith shall have possession of the house on November 1, 1884, and take her with him and take care of her as one of his own family. Without anything more and without possession of the property on the part of Smith and performance by him of the acts mentioned in the will to be done by him, the paper in question could not be regarded as anything more than a will revocable at the mere pleasure of the testator. But the offer of parol proof introduces other facts into the case, and as these were rejected by the court below they must be regarded as true for the purposes of this case. These facts were that the defendant, the devisee named in the will, took possession of the house and land in dispute under the will, and in pursuance of it, and that he was still there at the time of the trial; that the testatrix Sarah Smith moved into the premises with the devisee, in pursuance of the intention stated in the will, and there remained for a long time; and that the defendant at all times performed his part of the agreement indicated in the paper.

The offer should have been somewhat more specific and stated the acts which the defendant did in performance of his part of the agreement, but as it does allege an actual performance, it should be regarded as made in good faith, and therefore as fairly raising the question for consideration. Viewed in that light, the question is, what effect is produced upon the testamentary paper if the facts offered to be proved are true. It has long been held that such a case is not affected by the statute of frauds, because the terms of the agreement are put in writing, to wit, the will, and this is a sufficient compliance with the requirements of the statute: Brinker v. Brinker, 7 Pa. 53.

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The circumstance that it is not to take effect finally, until after the testator's death, will not prevent a specific performance during the life of the testator, if he has put the other party to the agreement in possession of the land. This was held in *McCue v. Johnston*, 25 Pa. 306, where the decree was refused only because there was no provision for possession during the life of the deviser in either the will or written contract, and no sufficient proof of a verbal contract for such possession. But in *Johnson v. McCue*, 34 Pa. 180, the same will and agreement were enforced in favor of the first devisee against devisees by a subsequent will, on the ground that the first will and agreement must be treated as an executed contract which the deviser was not at liberty to disregard. It is true, in that case the stipulation of the devisee was expressed in a written paper, but the decision of the question as to how the will was to be regarded, was not put upon that ground; and in *Brinker v. Brinker* the devisee's part of the contract was in parol, but he was nevertheless held entitled to treat the will as a contract and not as a will, and to have specific performance. It is true this was before our statute of frauds was passed, but the will was held to be a sufficient writing to take the case out of the statute in any event. In *McCue v. Johnston*, *supra*, the court said, "In point of fact so far as the instrument by which the conveyance is to take place, is involved, it is an executed contract on condition to take effect at the time specified. A devise transfers the legal estate and not an equity to be perfected by another instrument. It is the same as if a deed had been executed to take effect in futuro, only that the common law incident of a feoffment forbids the freehold remaining in abeyance, and a resort must therefore be had to a devise or a conveyance under the statute of uses."

It is clear, therefore, upon all the authorities, that the testamentary character of the testator's agreement is not a bar to relief, as upon an executed contract. The difficulty in regard to possession by the devisee during the lifetime of the deviser is removed, in the present case, by the fact that the will itself provides for a present possession to begin the day after the will was executed. Now, the offer of proof was, that such possession was actually taken by the devisee, and that he literally complied with the terms of the will by taking the de-

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visor in with him and keeping her there a long time, and that he performed all of his part of the contract and is still in possession. The only practical question then is, can he be deprived of his possession because the contract is contained in a testamentary paper? Certainly not, if for no other reason, because depriving him of his possession would disable him from the further performance of his contract, for which purpose his possession is indispensable according to the terms of the will itself.

We think, therefore, the learned court below was in error in rejecting the offer of proof by the defendant.

Judgment reversed, and new venire awarded.

127	348
140	40
127	348
158	534

APPEAL OF ROBERT DATESMAN.
APPEAL OF E. P. DATESMAN ET AL.

[DUNKEL v. DATESMAN.]

FROM THE DECREE OF THE COURT OF COMMON PLEAS OF
UNION COUNTY.

Argued May 16, 1889—Decided June 23, 1889.

[To be reported.]

1. The act of January 24, 1849, P. L. 677, prohibiting an execution sale of a life interest in real estate except upon notice to the life-tenant and with leave of court, etc., has no application to the sale of a life estate under a *levari facias* upon a mortgage given by the life-tenant, and such sale will pass his entire interest.
2. Where an auditor appointed to distribute the proceeds of such a sale, finds upon sufficient evidence that the mortgage under which the property was sold was given for the benefit of the life-tenant alone, the remaindermen having joined in it to perfect the security, the mortgage debt, as well as the costs and the expenses of audit, must be paid out of the interest of the life-tenant.
3. In distributing a balance remaining after payment of the debt and costs, where a life estate and the remainder are sold together under a mortgage given for the debt of the life-tenant, it is not error to fix the life interest at one third the value of the land, to charge against it the mort-

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gage debt and all costs, and award to the remaindermen the other two thirds in cash.

4. Two methods of distribution are lawful: One, to treat the surplus as real estate and direct its investment, until with its accumulations it reaches the value of the land sold, and then award the interest on the amount to the life-tenant during life, and at his death the corpus to the remaindermen; the other, to value the life interest, give the tenant thereof his share in cash, and divide the balance in cash to the remaindermen.
5. A life-tenant is not to be allowed, out of the proceeds of a sheriff's sale of the entire estate in lands, the amount expended by him for permanent improvements, when they were trifling and unimportant in character and there was no evidence adduced to show that they were made with the consent of the remaindermen.

Before PAXSON, C. J., GREEN, CLARK, WILLIAMS and McCOLLUM, JJ.

Nos. 453 January Term 1889, 35 July Term 1889, Sup. Ct.; court below, Lev. Fa. No. 13 May Term 1888, E. D., C. P.

On May 19, 1887, upon *levari facias* No. 13 May Term 1888, the sheriff returned a sale of certain real estate as the property of Robert Datesman, E. P. Datesman and H. M. Datesman, at the suit of Hiram Dunkel, for \$14,000, and the application to the writ for debt, interest and costs, of \$4,314.43, leaving a balance of \$9,685.57, which was paid into court. This balance was subjected to a prothonotary's commission, which left a net fund of \$9,583.72, to distribute which among the persons entitled *Mr. H. P. Glover* was appointed auditor.

On December 20, 1888, the auditor filed a report showing a finding by him of facts which in substance were as follows:

The fund in court arose from the sale of certain real estate in Kelly township, of which Sarah J. Datesman in her lifetime was seised in fee, and which at her death, intestate, in 1862, descended to her husband Robert Datesman, and to her two sons, Edgar P. Datesman and Harris M. Datesman; the said Robert Datesman taking therein a life estate, as tenant by the curtesy, and Edgar P. and Harris M., each an undivided one half interest in fee in remainder.

In January, 1878, Robert Datesman borrowed \$3,000 from one Alice Pilling; and Edgar P., his son, having become of age in June, 1878, secured this debt of his father by a mortgage to Miss Pilling, executed August 15, 1878, on his undi-

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vided interest in the land, receiving on the same date from his father an assignment of the latter's life-estate in the land, as collateral security for the obligation thus incurred; but this assignment was not recorded until July 10, 1883.

On January 27, 1883, the mortgage to Miss Pilling was paid off with money borrowed from one Hiram Dunkel, who received as security therefor a mortgage on the land referred to, executed by Robert Datesman, Edgar P. Datesman and Harris M. Datesman, and duly recorded on the same day. This mortgage was the first lien on the land, and the one on which the judgment and sale were had which produced the fund in court, and it secured, as did the Pilling mortgage for which it was substituted, the personal debt of Robert Datesman, the life-tenant, his sons Edgar P. and Harris M. being but sureties therein.

On April 2, 1883, Robert Datesman, as life-tenant, and Harris M. Datesman, as owner of an undivided one half interest in fee in remainder in said land, executed a mortgage of their respective interests therein to one Abraham Fairchild, to secure a loan of \$3,000 to said Harris M. Datesman, which mortgage was duly recorded April 3, 1883; in this mortgage Harris M. Datesman was the primary debtor and Robert Datesman was surety.

On October 26, 1887, judgment was entered in the Court of Common Pleas of Union county to No. 53 December Term 1887, by confession under a warrant of attorney on the bond accompanying said Fairchild mortgage, and the same day a fieri facias was issued thereon to No. 19 December Term 1887, and a levy thereon made upon the estates of said defendants bound by said mortgage, to wit, upon the life-estate of Robert Datesman and on the undivided one half interest in fee in remainder of Harris M. Datesman in said land.

On December 8, 1887, by virtue of said fieri facias which waived inquisition, the sheriff sold the undivided one half interest in fee in remainder of Harris M. Datesman in said land to Mary J. Datesman for \$3,900; and on the same day struck off the life-estate of Robert Datesman in the land to Abraham Fairchild, the plaintiff in said fieri facias, at the sum of \$100.

On December 22, 1887, the sheriff duly acknowledged in open court his deed poll to Mary J. Datesman for said half

Statement of Facts.

interest in fee in remainder of Harris M. Datesman in said land; and on the same day paid to McCleery & Voris, Esqrs., as attorneys for Abraham Fairchild, the plaintiff in above fieri facias, the sum of \$3,817.25, in full of the debt, interest, costs and attorney's commissions due him on said fieri facias. The sheriff also applied \$44.70 to costs on said writ and afterwards paid the sum of \$38.05 to Harris M. Datesman, defendant and principal debtor, thus fully appropriating the \$3,900 realized out of the latter's interest in the land.

On December 22, 1887, also, the court made an order fixing March 15, 1888, for reading a special return of sale of the life-estate of Robert Datesman, under above fieri facias, to Abraham Fairchild, the plaintiff therein; which return was read on said date, March 15, 1888, and deed poll therefor acknowledged.

Default having been made on the mortgage to Hiram Dunkel, he recovered judgment thereon against Robert Datesman, Edgar P. Datesman and Harris M. Datesman, by scire facias to No. 104 March Term 1888, and alias scire facias to No. 31 May Term 1888, for the sum of \$4,181.70, on April 28, 1888, and immediately issued a levari facias thereon, to No. 13 May Term 1888. Under the levari facias the sheriff made return that he had sold the land above mentioned to Mrs. Hannah Fairchild, wife of Abraham Fairchild, for the sum of \$14,000, of which sum he applied \$4,314.43 in payment of debt, interest and costs on said writ, and the balance, to wit, \$9,685.57 was paid into court.

Before the auditor the claimants upon the fund were:

1. Abraham Fairchild, who claimed to own the life-estate of Robert Datesman by purchase thereof under his fieri facias No. 19 December Term 1887, as above stated, and to be entitled to the entire fund in court for and during the lifetime of Robert Datesman.

2. Edgar P. Datesman and Mary J. Datesman, who claimed the entire fund as owners of the land sold; Edgar P. Datesman also claiming as vendee and assignee of all the estate of Robert Datesman in said land, by virtue of a bill of sale or assignment of said estate, executed August 15, 1878, as above mentioned.

3. Robert Datesman, who claimed that the fund in court remaining after the payment of the mortgage debt represented the land, and that, as life-tenant, he was entitled to the same for life.

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4. Ephraim Datesman, who appeared as plaintiff in a judgment entered May 12, 1887, to No. 138 May Term 1887, against Harris M. Datesman, which judgment, however, was discharged by the sale on the Fairchild fieri facias No. 19 December Term 1887, and was no lien on the fund now in court.

The auditor, discussing §§ 68-71, act of June 16, 1836, P. L. 775; §§ 6, 7, 8, act of October 13, 1840, P. L. (1841) 3; Pentland v. Kelly, 6 W. & S. 484; Dennison's App., 1 Pa. 201; Parget v. Stambaugh, 2 Pa. 485; Snively v. Wagner, 3 Pa. 275; Eyrick v. Hetrick, 13 Pa. 488; §§ 3, 4, act of January 24, 1849, P. L. 67; Commonwealth v. Allen, 30 Pa. 52; Kintz v. Long, 30 Pa. 502; Snyder v. Christ, 39 Pa. 507, ruled inter alia, that the sale of the estate of the life-tenant, either upon the writ to No. 19 December Term 1887, or upon that to No. 13 May Term 1888, passed no title thereto, because the act of January 24, 1849, had not been complied with in the following respects: (1) Neither sale was upon a venditioni exponas, preceded by a fieri facias and condemnation: (2) There was no order of court upon the applications of a lien creditor for the writs, after ten days notice of such applications to the life-tenant.

Wherefore the auditor reported as conclusions of law:

1. That notwithstanding the waiver of inquisition in judgment No. 53 December Term 1887, of Abraham Fairchild against Robert Datesman and Harris M. Datesman, the sale upon fieri facias No. 19 December Term 1887, was ineffectual and did not pass to said Abraham Fairchild the life-estate of Robert Datesman levied upon.

2. That the life-estate of Robert Datesman was not divested by the sale under the Dunkel mortgage, and that only the fee estate in remainder passed by said sale.

3. That the entire fund in court belonged to Edgar P. Datesman and Mary Jane Datesman, as the owners of the estates or interests that passed by said sale; and that, as to the mortgage debt which is first paid out of proceeds of said sale, the estates of said Edgar P. and Mary J. Datesman were only sureties, the undivested life-estate being the primary debtor.

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The auditor accordingly reported a distribution of the net fund in court, to wit, ... \$9,583.72 as follows:

To costs of audit, . . .	\$ 172.72
To Edgar P. Datesman . .	4,705.50
To Mary J. Datesman . .	4,705.50—\$9,583.72

Exceptions were filed to the foregoing report by both Abraham Fairchild and Robert Datesman, and after argument thereon, the court, BUCHER, P. J., on March 12, 1889, filed an opinion which after stating the facts proceeded:

On the facts just stated where does the surplus, \$9,583.72, go? Abraham Fairchild claims whatever sum will represent Robert Datesman's life-estate, but his difficulty is, that he purchased this life-estate, if at all, on a sale made on a fieri facias issued on a mortgage bond waiving inquisition, whereas the act of January 24, 1849, allows a sale of a life-estate only on a venditioni exponas issued by direction of the court, and after notice to the tenant for life; and here there was neither venditioni exponas, direction of the court, nor notice to the tenant for life: Commonwealth v. Allen, 30 Pa. 52; Kintz v. Long, 30 Pa. 602; Pentland v. Kelly, 6 W. & S. 481.

* * * * *

But the auditor also concludes that a life-estate mortgaged cannot be sold under a levavi facias issued on the judgment recovered on a scire facias; that it must be taken in execution as provided by the act of January 24, 1849; and that Hannah Fairchild's purchase of the land under the Dunkel mortgage did not carry Robert Datesman's life-estate, and that it is still intact and she owns the farm subject to it. If this is true, it is most unfortunate for this woman, who has paid full value for an out and out title. The act of 1705, 1 Sm. L. 59, provides that where default is made by mortgagors, at any time after twelve months therefrom, "it shall and may be lawful to and for the mortgagees to sue forth a scire facias; judgment to be given upon such scire facias that the plaintiff in the scire facias shall have execution by levavi facias; the said mortgaged premises shall be taken in execution and exposed to sale and upon sale conveyed to the

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buyer and freed from all equity and benefit of redemption."

We have seen that the act of January 24, 1849, provides the mode of selling life-estates: that ordinarily they cannot be sold on a *feri facias* or *levari facias* sur mechanics' lien. Was that act intended to apply to a mortgage?

A mortgage is a conveyance of the realty as well as security for a debt; and the holder may resort to ejectment even if the estate mortgaged is a life-estate. All the cases cited were ordinary judgments, except *Pentland v. Kelly*, 6 W. & S. 483, which was a mechanics' lien; and there execution was restrained because a sequestrator had already been appointed. No case has yet arisen on a mortgage which we have been able to discover. The question, then, is one of first impression. To require different forms of execution to issue simultaneously on the same judgment founded upon a mortgage would be burdensome and inconvenient; a *feri facias*, levy, inquisition and *venditioni exponas* against the life-tenant defendant, and a *levari facias* against the owner of the fee, and sales made at least weeks apart, an extent as to one and a sale as to the other. Under proceedings to enforce payment of a mortgage there can be no extent, and as the object of the acts of 1836, 1840 and 1849 was to prevent the sacrifice of life-estates, by applying rents and profits to the liquidation of the debts against them, those acts might well apply to all judgments where an extent is allowable. It is true that in *Pentland v. Kelly*, *supra*, a mechanics' lien was held within the acts. But a mechanics' lien does not exist by the written conveyance of the debtor, it is adverse; whereas a mortgage is a voluntary act and deed of the mortgagor, with specific remedies for collection, and is in fact a conveyance of the land itself and a specific pledge that it shall be responsible for the payment of the debt.

In the absence of express decision on the very question involved, we will hold that the life-estate of Robert Datesman passed to Mrs. Fairchild along with the fee of the remaindermen by the sheriff's sale. It never could have been intended that there should have been a difference in selling a life-estate and a fee on a mortgage. It would be burdensome, anomalous, unreasonable and unjust. The life-estate might pass to one

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man, the fee to another. It is unfair to Mrs. Fairchild, who has paid full value for a clear title obtained at a sale, to enforce the collection of a claim in which the life-tenant and the remaindermen all joined and agreed that if default was made in the payment of the debt for which the land was specifically pledged, the same should be sold.

This conclusion affects the appropriation made by the auditor but slightly. The facts found by him make Edgar P. Datesman and Harris M. Datesman sureties for their father in the Dunkel mortgage, and they are entitled to have the Dunkel mortgage debt of \$4,314.43 paid out of their father Robert Datesman's share of the fund.

Having reached the conclusion that the life-estate of Robert Datesman passed by the sale, we come to the appropriation of the entire surplus. There are two methods of appropriation open to us; one is to treat the surplus as real estate, and direct it to be invested until the accumulated interest on it swells the surplus to \$14,000, the entire value of the estate, and then award the interest of this \$14,000 to Robert Datesman, the tenant for life, so long as he lives, and at his death the principal or corpus of the estate, \$14,000, to the remaindermen; this accumulated interest to compensate the remaindermen because their interest was taken to pay the debt of the tenant for life. The other is, to treat the sale on the mortgage by all the parties in interest as a voluntary one; that is, the parties conveyed by mortgage and therefore subjected the property to sale by process, just as if they had deeded the two interests, life-estate and fee, to a purchaser. If they had done so, it is clear that their respective interests would have been one third for the life-estate and two thirds for the fee. The conversion, then, being for the debt of all, so far as the Dunkel mortgage was concerned, and by the consent of all three, the equitable rule in dividing the proceeds of a sale of the entire estate at one third and two thirds, is that one third cash, or absolutely, is equivalent to the interest on the whole for life.

How can Robert Datesman complain? If a man gets \$1,000 cash absolute, that is equal to interest for life on \$3,000. I take it this is what the common law rule means in valuing a life-estate at one third. It was the debt of the life-tenant which caused the sale, and he has thus voluntarily terminated his life-

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estate and caused a sale of the fee also. If his life-estate only had been sold to pay his debt of \$4,314.43, it would not have been paid, and there would have been no surplus. Then why should he receive interest when it took nearly all his interest to pay his debt? The land was converted by consent of all the owners. We will adopt the common law rule, which gives the value of the life-estate as one third of the fee. This seems more reasonable than to tie up the entire fund during the life of the tenant for life, by giving him the interest on the whole for that period. The sale must be treated as a conversion of all the interests into money, just as if they had all joined in a conveyance to a stranger for \$14,000 as the value of all their interests. . . .

Nothing remains save to make the appropriation and a suitable decree.

The court then divided the entire proceeds of sale, \$14,000, into three equal parts, one of which, \$4,666.66, less the mortgage debt and costs, \$4,314.43, and the prothonotary's commission, \$101.85, and the costs of audit, \$172.72, leaving \$77.66, was awarded to Robert Datesman, the remaining two thirds to E. P. Datesman and Mary J. Datesman, and signed the following decree:

And now, March 12, 1889, all the exceptions not sustained in the foregoing opinion are overruled, and it is ordered, adjudged and decreed that the fund in court for appropriation, which is \$9,583.72 be paid thus:

To Robert Datesman, ...	\$77.66 $\frac{2}{3}$
To Mary J. Datesman, ...	4,666.66 $\frac{2}{3}$
To Edgar P. Datesman, ...	4,666.66 $\frac{2}{3}$
To Costs of Audit, ...	172.72

Net amount for distribution \$9,583.72

Thereupon Robert Datesman took the appeal to No. 453, supra, specifying that the court erred, inter alia:

1. In distributing the fund in court to the remaindermen, in the lifetime of the tenant for life.

3. In holding that the life-estate of Robert Datesman passed,

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along with the fee of the remaindermen, to the purchaser at sheriff's sale under the *levari facias* No. 13 May Term 1888.

4. In not allowing to the life-tenant the amount expended by him for permanent improvements, as found by the auditor.

5. In charging the entire costs of sheriff's sale, audit, etc., against the share of the life-tenant.

And Edgar P. Datesman and Mary J. Datesman took the appeal to No. 35, *supra*, specifying that the court erred, *inter alia* :

1. In refusing to confirm the finding of the auditor, that the life estate of Robert Datesman was not divested by the sale under the Dunkel mortgage, and that only the fee estate in the remainder passed.

3. In decreeing any portion of the fund in court to Robert Datesman.

Mr. William R. Follmer and *Mr. Samuel H. Orwig*, for Robert Datesman, appellant.

Mr. Andrew A. Leiser and *Mr. Charles S. Wolfe*, for Edgar P. and Mary J. Datesman, appellants.

Mr. C. G. Voris and *Mr. J. Merrill Linn*, for Abraham and Hannah Fairchild, appellees.

ROBERT DATESMAN'S APPEAL.

OPINION, MR. CHIEF JUSTICE PAXSON :

The first question we have to consider is whether the life estate of Robert Datesman passed by the sheriff's sale on the writ of *levari facias* No. 13 May Term 1888. Prior to the sale the title was vested in the said Robert Datesman as tenant for life, with remainder to his two sons, Edgar P. Datesman and Harris M. Datesman. While the title stood in this position, the life-tenant and the two remaindermen united in a mortgage to Hiram Dunkel for \$4,181.70. Upon this mortgage a *scire facias* was issued, and upon the judgment recovered thereon a writ of *levari facias* was issued, No. 13 May Term 1888, and the mortgaged premises sold for \$14,000. It is upon the distribution of this fund that the questions in this case arise.

It was a conceded fact that the sale by the sheriff was without notice to the life-tenant or leave of court, as required by

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the act of 1849. It was contended on behalf of the appellant that under said act a life estate can only be sold upon a writ of venditioni exponas after ten days' notice to the life-tenant, and by leave of court, and a number of cases were cited in support of this proposition. *Pentland v. Kelly*, 6 W. & S. 483, was the case of a writ of *levari facias* issued upon a mechanics' lien. *Parget v. Stambaugh*, 2 Pa. 485; *Snavely v. Wagner*, 3 Pa. 275; *Eyrick v. Hetrick*, 13 Pa. 488; *Commonwealth v. Allen*, 30 Pa. 49; *Kintz v. Long*, 30 Pa. 501; and *Snyder v. Christ*, 39 Pa. 499, were all sales upon a writ of *fieri facias* or *venditioni exponas*. There is no question as to the law of these cases. Whether they apply to a sale under a mortgage is a different matter. Upon this point the industry of counsel has not furnished us with any decided case in this state, and I do not think it has been expressly ruled. I see no difficulty, however, in disposing of it upon principle. A sale of a life estate upon a mechanics lien, or an execution issued upon an ordinary judgment, is an adversary proceeding. A life-estate is an uncertain thing, and an adverse sale thereof can rarely take place without a serious sacrifice. The law, therefore, wisely lays its hand upon such a proceeding and prohibits a sale except upon certain conditions. But a sale upon mortgage is a different matter. No one doubts that a life-tenant may convey his estate by deed. A mortgage is but a conveyance with a clause of defeasance. It is something more than a lien; it is the grant of an estate as specific security for the money loaned. The mortgagee is not bound to proceed by *scire facias*, but may bring his ejectment. Moreover, a mortgage contains an express stipulation that if default be made in the payment of the money secured, the mortgagee may at once proceed to collect the same, and may issue a writ of *scire facias* thereon, "any law, usage, or custom, or anything herein contained, to the contrary notwithstanding." We are entirely clear that the act of 1849 has no application to the sale of a life-estate upon a mortgage given by a life-tenant, and that such sale passes his entire interest.

The remaining questions refer to the distribution. The auditor has found, and upon sufficient evidence, that the mortgage under which the property was sold was given for the benefit of the life-tenant alone, the two remaindermen having

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joined in it to perfect the security, but without receiving any part of the proceeds. Under such circumstances the mortgage must be paid out of the interest of the life-tenant, as also the expenses and costs of audit, as they were rendered necessary by his default. There were two modes of disposing of the fund, either of which would have been allowable. One was to invest the fund until with its accumulated interest it would amount to \$14,000, the sum which the property brought at the sheriff's sale, after which the life-tenant would have been entitled to the interest on the fund for life; the other was to value the life interest, give the tenant thereof his share in cash, and divide the rest between the two remaindermen. The court adopted the latter principle, and followed the old common law rule in force in England, and recognized in this state in Denison's App., 1 Pa. 201, and in Shippen's App., 80 Pa. 391, that one third of the capital sum is the measure of the life interest. The court therefore awarded \$67.66, which was all there was left of his interest, to the life-tenant, and the balance was equally divided between the two remaindermen. We see no error in this. The life-estate in the land was destroyed by the act and default of the life-tenant; the fund realized by the sale represented the entire title to the property; the interest of the life-tenant therein had been exhausted within a few dollars, and no good reason is apparent why the remaindermen should not have their money.

What has been said covers all of the assignments of error except the fourth, in which complaint is made that the court below erred in not allowing to Robert Datesman, the life-tenant, the amount expended by him for permanent improvements, as found by the auditor. I do not see that the appellant made any such claim before the auditor; certainly no such exception was made to his report. There was some evidence before him tending to show that the life-tenant had made some trifling improvements and repairs, but it was so unimportant as not to be included in his findings of fact. There was nothing to show that the improvements were made with the consent of the remaindermen, and it is settled law that the life-tenant cannot of his own motion improve the remaindermen out of their estate. Where the latter consent to improvements for the mutual benefit of the joint estate, and the property is afterwards sold

Syllabus.

to promote the interests of both, equity would perhaps allow the life-tenant a reasonable compensation for the value of the improvements. This assignment is not sustained.

The decree is affirmed, and the appeal dismissed at the costs of the appellant.

APPEAL OF EDGAR P. DATESMAN ET AL.

OPINION, MR. CHIEF JUSTICE PAXSON:

This appeal was from the same decree as Robert Datesman's Appeal just decided, and presents no question that was not considered and decided in that case. We need not repeat what was there said.

Decree affirmed, and the appeal dismissed at the costs of the appellants.

127 360
144 272
144 507

APPEAL OF R. A. BAER, EXR.

[ESTATE OF J. M. HARMAN, DECEASED.]

FROM THE DECREE OF THE ORPHANS' COURT OF LANCASTER COUNTY.

Argued May 21, 1889—Decided June 28, 1889.

[To be reported.]

1. If an administrator or other trustee invest the trust funds with a private banker, without an order of court but in good faith and under the advice of counsel, he must suffer a loss resulting from the insolvency of the banker, even though the latter was in undoubted credit at the time of the loan.
2. A certificate given by a banker that an administrator had "deposited" in his office a sum of money payable to his order or the order of his attorney, "on return of this certificate, twelve months after date, with interest," evidences not merely a deposit but a loan or investment of the money.
3. The legal effect of the certificate cannot be modified by parol evidence of a contemporaneous agreement that the money might be withdrawn, but without interest, at any time upon return of the certificate, except upon proof of its omission from the instrument by fraud, accident, or mistake.

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Before STERRETT, GREEN, WILLIAMS, MCCOLLUM and MITCHELL, JJ.

No. 14 July Term 1888, Sup. Ct.; court below, number and term not given.

On September 14, 1886, Daniel M. Harman exhibited his account as administrator of the estate of John M. Harman, deceased. The accountant charged himself in said account as of date June 24, 1884, with cash received from R. A. Baer, executor of the will of Daniel Harman, deceased, \$1,374.61. After certain items of credit for expenses of administration, counsel fees, etc., aggregating \$195.23, were set out on the credit side of the account, there was the following entry:

"The funds of the estate, after deducting the expenses of administration notices, etc., were on the 25th day of June, 1884, deposited in the bank of A. S. Henderson, in the city of Lancaster, for safe-keeping until such time as they might be wanted for distribution; the said bank being at that time in undoubted credit. In January, 1885, the said A. S. Henderson died, when it was first discovered that he was insolvent. His estate is now in due course of settlement, but it is yet uncertain what amount of dividend the depositors will receive. Accountant therefore claims credit, for the present, for the balance, \$1,179.38."

To the foregoing account, when presented for confirmation, Reuben A. Baer, executor of the will of Susanna Harman, deceased, who was the mother of said John M. Harman, deceased, and a creditor of his estate, filed certain exceptions, the fourth one of which was to the allowance of the credit claimed for the sum of \$1,179.38. Thereupon *Mr. William Leaman* was appointed auditor to hear and determine the exceptions, etc.

On December 10, 1887, the auditor made a report in which he found the following facts:

On June 24, 1884, Reuben A. Baer, executor of the will of Daniel Harman, deceased, paid to D. M. Harman, administrator of John M. Harman, deceased, the sum of \$1,374.61, being the share of the estate of said John M. Harman in the estate of said Daniel Harman. In view of the fact that there were claims against the estate of John M. Harman, to an amount sufficient, probably, to render it insolvent, Mr. D. G. Eshleman,

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who was the counsel of D. M. Harman, administrator, advised him that it would not be safe for him to make distribution until after giving notice to creditors, and also that it would be well during the interval to get interest on the money, if possible, so that the fund might be increased. The administrator then resided in Baltimore, Md. He accordingly left money in the hands of Mr. Eshleman, to be deposited on interest, if possible. Mr. Eshleman took the money, less some expenses and charges against it, to the banking house of A. S. Henderson in Lancaster city and deposited it, receiving the following certificate:

"\$1,354.11.

No. 1549

Banking House of A. S. Henderson,

LANCASTER, PA., June 25, 1884.

D. M. Harman, Administrator of the estate of John M. Harman, deceased, has deposited in this office thirteen hundred and fifty-four .11 dollars, payable to his order, or to the order of D. G. Eshleman, his attorney, on the return of this certificate, twelve months after date, with interest at the rate of four per cent per annum.

A. S. HENDERSON.

No interest allowed after due.

W. H."

At the time the deposit was made and the certificate received, it was agreed between A. S. Henderson and Mr. Eshleman, as the latter testified, that the money might be drawn out at any time within the year, on the return of the certificate, but in that event no interest was to be paid thereon.

A. S. Henderson was a private banker and continued in business as such until January 13, 1885, when he died. At the time the deposit was made and up to the time of his death, he was reputed solvent; his bank was in good credit, and was considered and dealt with by business men and the community generally as in a perfectly safe and sound condition. Mr. Eshleman kept his individual deposits in Mr. Henderson's bank, and also the funds of trust estates under his control.

A few days after Mr. Henderson's death, it was discovered that he was insolvent, and that the depositors with him could not be paid in full. On December 4, 1886, a dividend of \$357.42, on the principal and interest of the deposit, was awarded out of the estate of Mr. Henderson to D. M. Harman,

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the accountant, and afterwards paid to him. This was the entire amount received by the accountant upon the deposit made.

Mr. Eshleman, on behalf of the accountant, contended before the auditor, that under the foregoing facts the accountant should be charged with the said sum of \$357.42, only, against which all credits should be allowed. The exceptant contended that under the law and the facts the accountant should be held liable for the loss on the deposit, and be charged with all moneys that at any time came, or ought to have come into his hands.

The auditor, citing Hemphill's App., 18 Pa. 303; Frankfield's App., 11 W. N. 373; Worrell's App., 9 Pa. 508, ruled that the administrator, in dealing with A. S. Henderson and with his estate, had treated the deposit as a loan or an investment, evidenced by the written contract contained in the certificate; that, granting the alternative character of the contract, the accountant had made a loan or investment at the date of the certificate, which would continue as such until demand was made. He therefore sustained the fourth exception to the account, and, surcharging the accountant with \$1,179.38, the amount of the credit claimed, reported accordingly.

Thereupon the accountant filed exceptions to the report, alleging that the auditor erred in sustaining said exception, and in not finding the balance in the accountant's hands to be the sum of \$357.42.

The said exceptions having been argued, the court, PATTERSON, J., on May 11, 1888, filed an opinion, which, after stating the facts, proceeded:

That there is a difference in facts and in law, between a deposit, say of money, in a bank, and an investment or loan of money to a bank, cannot be doubted. Nor can we now doubt that the judicial law of Pennsylvania is that a loss which accrues of a trust fund invested or loaned on person's security must be borne by the trustee; not so, however, if the fund is a deposit made with common prudence in a banking institution of good standing and sound condition, in public estimation, and the loss is occasioned by sudden and unexpected insolvency.

Our Supreme Court has held that "all that a court of equity

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requires from trustees is common skill, common prudence, and common caution," and, we may add, good faith; "and executors, administrators, or guardians, are not liable, beyond what they actually receive, unless in case of gross negligence; for, when they act as others do with their own goods and with good faith, and are not guilty of gross negligence, they are not liable:" Neff's Appeal, 57 Pa. 96. In the present case there is no allegation of fraud; no charge of bad faith or gross negligence; no want of common prudence, or common caution in the accountant or in his counsel, his agent. On the contrary, the auditor finds that all that was done in this matter, both by the accountant and by his attorney, was done in good faith and for the supposed best interests of the trust estate.

This question is now being considered in a court of equity, and why should not equity be dispensed? Should the question be determined on the evidence adduced, or upon only part of the evidence? The question paramount, and the question to be determined is, was the money placed in Henderson's bank by the accountant a deposit or an investment? In determining that question, not only must the written receipt of June 25, 1884, be considered, but also what was agreed to by the banker and the depositor cotemporaneous with that receipt. The evidence is uncontradicted and before the auditor, with all the explicitness and efficacy of the receipt in writing, that it was agreed between Henderson and the accountant's attorney "that the money deposited could be drawn out at any time within the year on the return of the certificate, but in that case no interest to be paid thereon."

* * * * *

The auditor and the court should look at this evidence, should give it all credence demanded by the circumstances. And if that is done, what must be the conclusion and presumption of law? That "the money deposited could be drawn out at any time within the year on the return of the certificate" is the evidence. It was then a deposit of the money, and so deposited that it could be drawn with the greatest facility at the shortest notice of danger. It was within the entire control of the trustee all the time, with all the characteristics of a pure deposit, and if the trustee acted in good faith and for the best interest of the estate, as he supposed

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and had reason to believe, and without being guilty of negligence, how can a court of equity hold him responsible? As ruled in *Roberts's Appeal*, 92 Pa. 422, "according to the well established rules on this subject, there was no supine negligence in the trustee, which ought to make him responsible for the loss of this money."

There is sufficient ground for the interference of the court wherever the exercise of the discretion by the trustee is infected with fraud or misbehavior of some kind, but not as in the present case where there is an entire absence of even the suspicion of fraud; and, where trustees have a discretionary power they must exercise their judgment according to the circumstances as they exist at the time. "And a court of equity," as is said in *Thompson v. Brown*, 4 Johns Ch. 619, "always treated trustees acting in good faith with great tenderness."

Now what were the circumstances of or attending this fund in the hands of D. M. Harman, administrator of the estate of his relative, Jno. M. Harman, deceased? He received \$1,374.61. His counsel, as testified, inasmuch as there were claims against Jno. M. Harman's estate, probably sufficient to render it insolvent, advised him that it would not be safe to make distribution of the money then until after he gave notice to creditors, and advised him also that it would be well during this time to get interest on this money if he could, so as to make the fund as large as possible for distribution. The administrator then lived in Baltimore, Md., and left the money with his counsel to deposit at interest if possible. And on June 25, 1884, his counsel deposited the money in the bank of A. S. Henderson, in the city of Lancaster, as appears in Henderson's receipt; "and at the time that deposit was made and the certificate taken it was agreed between A. S. Henderson, banker, and myself (accountant's counsel) that the money could be drawn out at any time within the year on return of the certificate." The receipt or certificate of Henderson was made payable to the order of D. G. Eshleman as his (the administrator's) attorney, which shows the banker knew his relation to the administrator, and his authority to make a contract for him. All the circumstances of the case, therefore, show that this was a deposit, and not a loan, and we must, therefore, and now do set aside the finding of the auditor that it

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was a loan. It was an arrangement made for the best interests of the estate; to be drawn out any time if wanted, and if not wanted to bear interest. The auditor has found that Mr. Eshleman is a well known lawyer of the best reputation. There cannot be even a shadow of doubt thrown on his testimony. The auditor himself has no doubt about the truth of Mr. Eshleman's testimony. He says in his report that "it has been found that there was an oral agreement or arrangement between Mr. Henderson and Mr. Eshleman." The deposit was made about six and one half months, and then, to use the language of the auditor, "a few days after the death of Mr. Henderson the disclosure came suddenly and without premonition that his estate was insolvent, and that the claims of depositors in his bank could not be paid in full." Is there any want of good faith, vigilance or watchfulness made to appear in all the foregoing on the part of the administrator or his counsel? We can perceive none.

What other sensible thing could be done, the banker being dead and his estate insolvent, than at the distribution of the banker's assets, to present the receipt or certificate of deposit, with all the interest accrued, and demand the dividend pronounced? Should the administrator have surrendered his certificate and demanded the money on the oral contract? Had he done so, it would have brought no response. There were no funds in the bank to answer that demand. Yet the learned auditor argues, because he did not do so, but presented the certificate with the accrued interest added, and obtained thereon a dividend out of the insolvent banker's estate, therefore, he dealt with the deposit as an investment and must be held for the loss. We think that by any other course of dealing with the money so deposited, after the insolvency and death of Mr. Henderson, the banker, became known, than that which was adopted, the administrator would have been justly chargeable with want of good faith. The trustee, or administrator, seems to have done, and by the advice of counsel, too, everything he could profitably do. Every step was taken by the advice of counsel and it does not appear anywhere that by neglect of duty or mismanagement of the trust, he has rendered himself liable for the loss to this estate.

2 Lewin on Trusts, 322, reads, "that a trustee is called

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upon to exert precisely the same care and solicitude on behalf of his cestui que trust, as he would do for himself, but greater measure than this a court of equity will not exact." The Supreme Court in *Eyster's App.*, 16 Pa. 372, from a decree of the Orphans' Court of Franklin county, says: "It has been said in this court to be the harshest demand that can be made in equity to make a trustee answerable for what never was in his hands, or to make up a deficiency not owing to his wilful default." This rule has been so often laid down in reports, that it seems unnecessary to refer to any authorities on that point. But we here may refer to the sound and equitable opinion of Lord HARWICKE as expressed in *King v. Earl of Plymouth*, 1 Dick. 126, and quoted by Chief Justice GIBSON in *During's App.*, 13 Pa. 235: "If there is no mala fides," said he, "nothing wilful in the conduct of the trustee, the court will always favor him. For, as a trust is an office necessary in the concerns between man and man, and which if faithfully discharged is attended with no small degree of trouble and anxiety, it is an act of great kindness in any one to accept it. To add hazard and risk to that trouble, and to subject a trustee to losses, which he could not foresee, would be a manifest hardship and deter any one from accepting so necessary an office." And the Chief Justice adds: "His (Lord HARWICKE'S) rule of responsibility is politic and just."

The above manifestly just rule applied to trustees ought, we think, to prevail in equity and be administered in this court. The whole of this contract of deposit, the written and the verbal parts, must be considered by the court, the auditor having found both to be existing facts. The accountant in the opinion of the court is not, under the facts and the law, accountable for the loss occasioned by the insolvency or failure of Henderson's bank.

In accordance with the foregoing opinion, the court restated the report of the auditor, surcharging the accountant with the dividend received from the estate of A. S. Henderson, \$357.42, against which were credited the costs and expenses of administration and audit, and so decreed. Thereupon the expectant to the account as first exhibited took this appeal, specifying that the court erred in sustaining the several exceptions to the auditor's report.

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Mr. Eugene G. Smith and Mr. L. Ellmaker (with them *Mr. G. C. Kennedy*), for the appellant.

Counsel cited: *Frankenfield's App.*, 11 W. N. 373; *Hemp-hill's App.*, 18 Pa. 303; § 14, act of March 29, 1832, P. L. 193; § 1, act of May 8, 1876, P. L. 133; § 2, act of April 13, 1854, P. L. 369.

Mr. D. G. Eshleman, for the appellee:

1. Trustees will not be held responsible when acting in good faith and under the advice of counsel: *Calhoun's Estate*, 6 W. 189; *Spering's App.*, 71 Pa. 25; *Vez v. Emery*, 5 Ves. 144. It is the hardest demand that can be made in equity, to compel trustees to make up a deficiency not owing to their wilful default: *Witmer's App.*, 87 Pa. 124; *Jackson v. Jackson*, 1 Atk. 513; *Johnson's App.*, 12 S. & R. 317; *Neff's App.*, 57 Pa. 91; *Gochenauer v. Froelich*, 8 W. 22. The measure of diligence and care required of a trustee, is that which a man of ordinary prudence would practice in the care of his own estate: *Fahnestock's App.*, 104 Pa. 46; *Eyster's App.*, 16 Pa. 372; *Witner's App.*, 87 Pa. 120; 1 *Lewin on Trusts*, Amer. Law Series, 294*.

2. *Frankenfield's App.*, 11 W. N. 373, is to be distinguished; yet the opinion in that case contains a summary of the principles of equity upon which the accountant in this case relies. In that case, the certificate was for three months with interest, but the money could not be withdrawn without thirty days' notice of the intention. Mr. Justice GREEN says: "During that period it was entirely beyond the control of the depositor. He could make no legal demand for the money until at least three months had expired, and not even then unless he had given thirty days' notice of his intention to withdraw the fund. In no essential feature does this transaction differ from an ordinary loan. . . . The distinguishing feature of the case is, that even if the money be regarded as deposited in the technical sense, it was also loaned, and hence was subject to the qualities and incidents of a loan."

OPINION, MR. JUSTICE GREEN:

The certificate of deposit in this case is of the same form as the one in *Frankenfield's App.*, 11 W. N. 373, and it was

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undoubtedly evidence of a loan for twelve months at four per cent interest, of the amount deposited. Upon the considerations mentioned in the opinion in that case, the administrator, D. M. Harman, who made the loan, must suffer the loss resulting from the insolvency of Henderson, unless there is something in the present case to take it out of the operation of the decision in Frankenfield's Appeal.* The only matter set up

*The opinion in Frankenfield's Appeal, filed April 3, 1882, so far as relating to the question raised in the above case, was as follows:

GREEN, J.: In this case the appellant, who was the committee of a lunatic, having trust funds in his hands, made a deposit of \$2,000 thereof in the Franklin Savings Bank of Allentown, Pa., and took a certificate therefor in the following form:

Certificate
of Deposit.

Franklin Savings Bank,
Allentown, Pa., [Stamp.]
November 11th, 1876.

S. A. Frankenfield, Committee of Samuel Frankenfield, has deposited in this Bank Two Thousand Dollars, payable to his order, three months after date, with interest at the rate of six per cent per annum, on return of this certificate.

Thirty days' notice to be given of the intention to withdraw this deposit.

\$2,000.

J. E. ZIMMERMAN,
Cashier.

D. H. MILLER,
Per J. E. Z., President.

The deposit was made in the name of the committee as such; it was done by the advice of counsel, and at the time of the transaction the bank was in good repute. So far, therefore, as these considerations affect the question of the appellant's liability for the loss of the money by reason of the insolvency of the bank, it must be conceded at once that no liability would arise. There was no bad faith on the part of the appellant, and although the bank was really insolvent when the deposit was made, that fact was not known in the community. The question at issue is thus reduced to the narrowest limits. If this had been an ordinary deposit, subject to the check of the depositor from the day it was made, it is very probable the appellant would not have been liable. But it was not such a deposit. In practical effect, it was a loan to the bank for a fixed period and payable with interest. During that period it was entirely beyond the control of the depositor. He could make no legal demand for the money until at least three months had expired, and not even then unless he had given thirty days' notice of his intention to withdraw the fund. In no essential feature does this transaction differ from an ordinary loan. It is true, the borrower is a bank and not an individual. But that circumstance is of no moment in determining the character of the transaction. It is a loan still, just as it would have been had the depository been a citizen or

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to work this result is a parol contemporaneous agreement made by the counsel of Harman with Henderson, the banker, that the money might be drawn out at any time within the year on the return of the certificate, but in that event without interest. As such a contract is entirely contrary to the written agreement, it is incompetent to change the latter by means of the parol testimony, except upon proof of its omission from the written contract by fraud, accident, or mistake. An examination of the testimony of Mr. Eshleman disproves the possibility of any such theory. He simply says that such a verbal agreement was made at the time of the deposit. He does not say that he was induced to make the deposit and accept the certificate, upon the faith of any promise that the money might be drawn out at any time within the year, nor that there was any kind of fraud, accident, or mistake in the transaction. It is unnecessary to cite the numerous authorities that unless these elements are present, the written contract must stand as it is, unaffected by the parol proof. The question of good

a firm of the greatest wealth, or a manufacturing or business corporation of large capital and resources. In these latter cases, the security would apparently have been greater, for the capital of this bank was actually very small. The distinguishing feature of the case is, that even if the money be regarded as deposited in the technical sense, it was also loaned, and hence was subject to the qualities and incidents of a loan superadded to those which belonged to it as a deposit.

Nor does the brevity of the time affect the question. There could be no difference in principle between a deposit payable in three months and one payable in twelve or twenty-four months, when the question relates only to its character as a loan. This being so, the law regulating investments by committees of lunatics becomes applicable to the case and controls it. The act of June 13, 1836, § 25, P. L. 597, expressly directs that such investments must be made under the direction of the Court of Common Pleas, and only exempts the committee from liability for loss when he pursues this course and in good faith. In Hemphill's App., 18 Pa. 303, it was formally and definitely settled that a trustee can only protect himself from risk when he invests the trust fund in real or governmental securities or makes the investment in pursuance of an order by the court. On page 306, BLACK, C. J., says: "It has never been doubted anywhere that a loss which accrues of a trust fund invested on personal security, must be borne by the trustee." These considerations determine that the auditor and court below were right in holding the appellant liable for the loss of the sum of one thousand dollars, deposited with the Franklin Savings Bank.

Syllabus.

faith on the part of the administrator and his counsel in making the deposit does not arise, because it cannot change the result. No one can doubt that so far as they were concerned the highest integrity and utmost good faith characterized the transaction. It is simply an instance of misplaced confidence, unfortunate in its consequences, but which must nevertheless be disposed of according to the plain legal rules which govern all similar cases.

The decree of the Orphans' Court is reversed and record remitted, with instructions to restate the account in accordance with the foregoing opinion, the costs of this appeal to be paid by the appellee.

S. T. WILSON ET AL. v. JOS. VANLEER ET AL.

ERROR TO THE COURT OF COMMON PLEAS OF LANCASTER
COUNTY.

Argued May 21, 1889—Decided June 28, 1889.

[To be reported.]

127	371
164	71

127	371
25 SC	231

127	371
41SC ¹⁸³	
41SC ¹⁸⁵	

(a) A witness, called to prove the signature of an alleged testator to a testamentary paper, testified that he had seen the testator write his name twice to letters thirty-two years, and once as an indorsement upon a check twenty-three years, prior to the time when he was called to testify.

1. There being no subsequent evidence raising any question as to the truth of the facts so stated, the competency of the witness to express his opinion as to the signature was a matter clearly for the court, and it was not error to refuse to allow the jury to review the ruling of the court thereon.
2. The ruling that the witness was competent to testify concerning the handwriting, was within the line of the authorities, but, considering the untrustworthiness of opinions on handwriting in general, such evidence ought to be guarded with caution.
3. The limit within which the witness must have seen the writing done, must depend upon his intelligence, his habits of observation, and the

Statement of Facts.

apparent strength and confidence of his memory, which must be passed upon in the first instance by the trial judge.

4. In an argument to the jury, counsel may refer to the almanac to show that a certain day of the month given in the testimony of a witness, was or was not a certain day of the week, though the almanac was not proved and put in evidence, judicial notice being taken of the fact, without evidence.

Before STERRETT, GREEN, WILLIAMS, MCCOLLUM and MITCHELL, JJ.

No. 155 January Term 1889, Sup. Ct.; court below, No. 29 December Term 1884, C. P.

On August 22, 1885, an issue devisavit vel non, wherein Joseph VanLeer and Caroline, his wife, in right of said Caroline, were plaintiffs, and Sidwell T. Wilson and Needham M. Wilson, executors of the will of Needham Wilson, were defendants, was formed to try whether or not a certain testamentary paper was a codicil to the last will and testament of Needham Wilson. The issue had been directed by the Orphans' Court upon an appeal by said executors from the decree of the register of wills, admitting said paper to probate.

At the trial on October 15, 1888, the plaintiffs put in evidence the will of Needham Wilson, dated March 2, 1865, and duly admitted to probate on September 28, 1872. They then put in evidence, under objection and exception to the defendants, the record of the appeal from the decree of the register, dated June 23, 1883, admitting to probate the alleged codicil.

Margaret Manahan, called by plaintiffs, testified that she had known Needham Wilson, deceased, from the time she was a little girl until he died; that she saw him write and sign his name to the paper dated August 13, 1865, shown to her and marked for identification; that he came to her house on that day and asked for her sister Caroline, now Mrs. VanLeer; that she told him her sister had gone to the country, when he asked her for paper, pen and ink; that she had no paper, and gave him a pen and ink and got him a "copy-book," from which he tore a piece of paper and wrote thereon the instrument in question and signed it; that he then folded up the paper, gave it to witness, and directed her to give it to Caroline when she returned. On cross-examination, the witness stated that when

Statement of Facts.

the paper was written and signed, only herself and her little boy were at home, her husband being absent, railroading; that he got off only on Sundays, and he wasn't at home at this time, because it wasn't his time to be off.

Cornelius Carman, called by the plaintiffs, testified that he was a brother of Caroline VanLeer, and had known Needham Wilson from his own boyhood; that when the witness was ten or eleven years old, which was thirty-two years before the trial, he was living with Mr. Wilson and saw him write two or three letters to the witness's father; that in October, 1865, the witness was with Mr. Wilson at a hotel in Lancaster, and saw him write a memorandum of articles he wished to purchase and indorse his name on a check, and since then witness had not seen Mr. Wilson write. The witness was subjected to a rigid cross-examination, and testified to his belief that the signature and the whole of the paper shown him was in the handwriting of Needham Wilson.

The plaintiffs then offered the paper in evidence.

Objected to by defendants: We do not think it has been proven by two witnesses as prescribed by law.

By the court: Objection overruled, offer admitted; exception.¹

The paper as then read to the jury was as follows: *

"August 13, 1865.

"I give thes fiew lines to Caroline Carman to show that I want her to have the sum of twelve hundred dollars at my death she livd with mee A number of years And got verry little for it so i thought it rite to leave her This little sum to to be paid out of my home property

from NEEDHAM WILSON."

The plaintiffs then rested.

The defendants called a number of witnesses whose testimony tended to prove that the paper in question was not in the handwriting of Needham Wilson, nor executed by him.

* On August 18, 1877, nearly five years after the death of Needham Wilson, Caroline VanLeer, formerly Carman, brought assumpsit upon the above instrument as an obligation for the payment of money. A judgment obtained by the plaintiff in the court below was reversed by the Supreme Court on June 4, 1883, on the ground that the instrument was not an obligation to pay money, but a testamentary paper: *Wilson v. VanLeer*, 103 Pa. 600.

Charge of Court below.

In his argument to the jury on behalf of the defendants in the issue Mr. Brown said:

I now offer to show to the jury an almanac, and to call their attention to the fact that the 13th of August, 1865, came on Sunday.

Objected to.

By the court: Objection sustained, offer refused; exception.⁵

The court, PATTERSON, J., charged the jury saying, *inter alia*:

The law of Pennsylvania says: "Every will shall be in writing, and unless the person making the same shall be prevented by the extremity of his last sickness, shall be signed by him at the end thereof, or by some person in his presence, and by his express direction; and in all cases shall be proved by the oaths or affirmations of two or more competent witnesses; otherwise, such will shall be of no effect." The paper before you is signed, as you have been shown, by a name; by the name Needham Wilson. Now the question for you is, is the name of Needham Wilson to that paper the genuine signature of Needham Wilson. The plaintiffs called two witnesses, whose evidence you heard, who swore that that signature is genuine; one of them testified that she saw Needham Wilson sign the very signature to that paper. [These two witnesses, Margaret Manahan and Cornelius Carman have been admitted by the court and held to be competent witnesses. They are competent witnesses.]⁴ Of course, their credibility is for you, the jury. The credibility of all witnesses in every case tried by a jury is for the jury. That is, whether they are truthful, or whether you will believe them. The two competent witnesses need not be subscribing witnesses; that is, their names need not be subscribed to the will or paper. The signature of the alleged maker of the paper may be proved by witnesses who have knowledge of his handwriting and who were well acquainted with it, as was one witness who was called here in this case.

* * * * *

The defendants have requested the court to charge:

1. No will or codicil is of any effect unless proved by the oaths or affirmations of two or more competent witnesses.

Charge of Court below.

There must be at least two competent witnesses to prove every will or codicil.

Answer: We say, yes, to that. There must be two witnesses.

2. In the case now before the jury, the testimony of Margaret Manahan is in itself insufficient to prove the execution of the alleged codicil, and with nothing else but it to guide them, the verdict must be in favor of the defendants.

Answer: Yes. Because, as we have stated, there must be two competent witnesses to validate a will.

3. If the jury do not believe Cornelius Carman is a competent witness to prove the execution of the alleged codicil, the verdict must be in favor of the defendants.

Answer: We deny that point as stated. The belief of the jury as to Cornelius Carman being a competent witness has nothing to do with his competency. Competency means the legal fitness of a witness to be heard on the trial of a cause. It is a legal question, and the court is the sole judge of his competency. The jury has nothing to do in deciding whether he is competent. If the court think he is so interested, or in a position that he cannot testify, they will rule him out; but if they decide he is a competent witness, then that makes his testimony come before you, like that of any other witness. The court admitted Cornelius Carman as a competent witness; his testimony, however, is for the jury like any other witness; his credibility is for them to determine.²

4. Unless the jury believe that two competent witnesses have proved the execution of the alleged codicil, the verdict must be in favor of the defendants.

Answer: Yes. Two competent witnesses; that is so. As we have already stated, competency means a legal witness, and the court is the sole judge of his or her competency. In this case the court has received him and permitted him to testify as a competent witness. The jury's belief of his testimony cannot determine his competency. That is a duty to be discharged by the court. They may, however, or may not believe his testimony. You may or you may not believe it. His testimony with that of Mrs. Manahan constitute the two witnesses to this little will.³

The jury returned a verdict in favor of the plaintiffs. A

Arguments.

rule for a new trial having been discharged, judgment was entered on the verdict, when the defendants took this writ, assigning as error:

1. The admission of the plaintiffs' offer.¹
- 2, 3. The answers to the defendants' points.^{2 3}
4. The portion of the charge inclosed in []⁴
5. The refusal of the defendants' offer.⁵

Mr. J. Hay Brown (with him *Mr. S. H. Reynolds*), for the plaintiffs in error:

1. Two or more competent witnesses are required in all cases. "Each must separately depose to all facts necessary to complete the chain of evidence, so that no link of it may depend on the credibility of but one:" *Derr v. Greenawalt*, 76 Pa. 239. Applying this rule, how can the testimony of Carman be received, as proving the execution of the codicil? It is to be considered independently of Margaret Manahan's testimony, and if insufficient of itself, nothing that she testified to can help it. The court held that Carman was competent. He may have been competent to testify, but his testimony was not competent to prove the fact he was called to establish. Carman was not only to be a competent witness, he was to be "complete:" *Carson's App.*, 59 Pa. 493; and, having fallen short, the proof of execution was not up to the statutory standard, and the judgment of the court below on that point should be reversed.

2. The court properly told the jury that the credibility of Mrs. Manahan was for them; that unless they believed her, the execution of the paper had not been proved as required by the statute. August 13, 1865, came on Sunday, when, according to her testimony, her husband ought to have been at home. Had the counsel been allowed to show that fact to the jury, the verdict rendered after a deliberation of two days might have been different. That the court will take judicial notice of an almanac, and that it need not be formally offered in evidence, is a doctrine well recognized: *Starkie on Ev.*, 738*. The error on this point was most palpable, and the effect of it hurtful to the defendants.

Mr. D. G. Eshleman and *Mr. A. Herr Smith*, for the defendants in error:

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1. "There are two modes of acquiring knowledge of the handwriting of another, either of which is universally admitted to be sufficient to enable a witness to testify to its genuineness. The first is, from having seen him write. It is held sufficient for this purpose that the witness has seen him write but once, and then only his name. The proof in such case may be very light, but the jury will be permitted to weigh it:" 1 Greenl. Ev., § 577. And see *Shitler v. Bremer*, 23 Pa. 413; *Taylor v. Sutherland*, 24 Pa. 385.

2. If the offer of the almanac had been made in time, it would have been irrelevant. It does not contradict the witness, nor even tend remotely in that direction. We deny that it is a principle well recognized, that the court will take judicial notice of an almanac. There is no American case nor elementary book that recognizes the principle. It is not so stated in *Starkie on Evidence*, *738, or on any other page. In a note to said page, some old English cases are referred to, which intimate that the court will take judicial notice of the calendar, but even there nothing is said about an almanac.

OPINION, MR. JUSTICE MITCHELL:

The competency of Cornelius Carman was in the first instance clearly a matter for the court, and no subsequent evidence having raised any dispute of fact upon it, the learned judge was right in saying that the court was the sole judge of competency, and refusing to allow the jury to review the ruling. Had the facts upon which the judge held him *prima facie* competent been denied or contradicted, it might have been proper to submit the whole matter to the final decision of the jury: *Lee v. Welsh*, 1 W. N. 453; but there was no such conflict as made that course necessary.

The learned judge was also within the line of authorities, in holding that Carman had sufficient knowledge of Wilson's handwriting to make him competent to testify concerning it. It is said to be sufficient if the witness has seen the party write but once, and then only his name: 1 Greenl. Ev. § 577; and probably no higher standard can be fixed for a definite rule, though, considering the untrustworthiness of opinions on handwriting in general (see note of Chief Justice REDFIELD to his edition of Greenleaf, vol. 1, sec 578), such evidence

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ought to be guarded with great caution. Nor in the nature of things is it possible to fix any arbitrary limit of time within which the witness must have seen the writing done. That must depend on his intelligence, his habit of observation of such matters, the apparent strength and confidence of his memory, etc., which must be passed upon in the first instance by the trial judge. Carman's knowledge seems not only to have been extremely stale, but of the narrowest extent, and if the learned judge had held that it was too remote and unreliable to qualify him, we should not have been disposed to disagree with him. But the matter was within his discretion, and his conclusion was, as already said, within the line of the authorities. It was therefore for the jury and not for us to determine the weight to which the testimony should be entitled. The assignments of error in relation to Carman's testimony are therefore not sustained.

We are obliged however to hold that the court erred in refusing to permit the counsel for defendants below to refer to the almanac to show, in support of his argument against the testimony of Margaret Manahan, that a certain date in 1865 fell upon Sunday. All of the authorities agree that this is one of the matters that do not require to be proved, but are taken judicial notice of, without evidence. "Neither is it necessary to prove the coincidence of days of the week with days of the month:" 1 Greenleaf, § 5; and see Starkie on Evidence, pt. 3, sec. 20 (p. 738 of 10 Am. ed.) "It is wholly immaterial whether the facts of public and general history, and their dates, are recognized by the court, sua sponte, the chronicles or almanacs being used merely to aid the memory; or whether they will remain unnoticed until suggested by the parties and verified by the books; or whether the books themselves are adduced by the parties as instruments of evidence; the process and the result being in each case the same:" 3 Greenleaf, § 269.

The mere mode of introducing the almanac seems to vary, as indicated by the last extract from Greenleaf, but as all the authorities agree that no proof is necessary, it follows that it is not required to be put in evidence at all. "The almanac in such cases is used, like the statutes, not strictly as evidence, but for the purpose of refreshing the memory of the court and

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jury:" *State v. Morris*, 47 Conn. 179. "The almanac is part of the law of England," *POLLOCK, C. B.*, in *Tutton v. Darke*, 5 H. & N. 649.

In *Hanson v. Shackleton*, 4 Dowl. 48, there was a rule to set aside a writ, on the ground that it was dated on Sunday, and the report proceeds:

"COLERIDGE, J. Have you an affidavit showing that the day on which this writ is dated was a Sunday?

"BAYLY. The affidavit does not state that it was Sunday, but the day of the month being given the court is bound to take judicial notice on what day of the week that day fell. C. A. V.

"COLERIDGE, J. I have consulted the other judges and they are of opinion I ought to take judicial notice of what the day was on which this day of the month fell. Rule absolute."

So in *Reed v. Wilson*, 41 N. J. Law, 29, there was a declaration on a note dated August 12th, at four months, and on demurrer assigning, inter alia, that the narr. showed demand and protest on December 14th, one day too soon, the court took judicial notice that December 15th was Sunday, and therefore that the demand was made on the proper day.

In *R. R. Co. v. Lehman*, 56 Md. 226, it was held that "it is the duty of the court to notice the days of the week on which particular days of the month fall; and hence we know without other averment (on demurrer) that the 28th of July was Sunday."

And in *McIntosh v. Lee*, 57 Ia. 358, it was said by the court, "the petition alleges that the defendant entered into the written lease on March 10, 1878. Courts take judicial notice that the tenth day of March, 1878, was Sunday. The petition therefore in effect alleges that the lease was executed on Sunday," and it was therefore held that under the pleadings evidence was not admissible that the lease was executed on Monday.

These authorities, and none have been found in opposition to them, show clearly, that however often departed from as a matter of convenience, the rule is that matters of which judicial notice is taken, including the dates in the almanac, do not require to be put in evidence at all.

It is argued for the defendant in error that the fact of August 13th having been Sunday, did not necessarily contra-

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dict Mrs. Manahan, and therefore that even if the court below committed an error it was an immaterial one for which the judgment should not be reversed. But there was an apparent contradiction, which at least required explanation, and in a case where the evidence in support of the plaintiff's case was so meagre, it is impossible to say that even a slight doubt thrown on the testimony of the main witness, would not have turned the scale in the minds of the jury.

It is also argued that the almanac having been brought forward at so late a stage in the case, deprived the plaintiff below of the benefit of an argument upon it by one of her counsel. But in this respect it was like any other argument or illustration which counsel may make towards the end of a case. If it has not been anticipated it is a surprise, and that is a risk which parties must encounter in every case. If counsel had run the calculation back himself, so as to show that that day was Sunday, no one could have questioned his right to do so. His reference to the almanac was no more than a reference to the multiplication table, as a labor saving mode of refreshing or confirming knowledge legally presumed to be in everybody's mind. This kind of surprise is one of the dangers incident to every contest, and the only relief against it, is the discretion of the judge, where the new matter or new view may lead to substantial injustice, and is such as could not reasonably have been foreseen, to allow an opportunity of reply, or subsequently to grant a new trial.

Judgment reversed, and venire de novo awarded.

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LYDIA R. MARTIN v. JACOB RUTT.

ERROR TO THE COURT OF COMMON PLEAS OF LANCASTER
COUNTY.

Argued May 22, 1889—Decided June 28, 1889.

1. In a feigned issue to try the title to goods levied upon as belonging to a husband, but claimed by his wife, the declarations of the husband

Statement of Facts.

adverse to the claim of the wife, made in her absence and after the levy, are not admissible upon any theory.

2. As declarations, they are secondary, not being those of the plaintiff herself; as declarations of an agent they are incompetent, because not part of the *res gestæ*; and finally, they are incompetent because they are the declarations of a husband against his wife.

Before STERRETT, GREEN, WILLIAMS, MCCOLLUM and MITCHELL, JJ.

No. 218 July Term 1888, Sup. Ct.; court below, No. 52 June Term 1887, C. P.

On June 20, 1887, an issue was formed, under the sheriff's interpleader act, in which Lydia R. Martin and D. G. Hoffman were plaintiffs, and Jacob Rutt, Sr., defendant, to try the title to certain personalty levied upon by the sheriff as the property of D. G. Martin, Lydia R.'s husband, under a judgment by Rutt against Martin, but claimed by the plaintiffs.

The goods levied upon consisted of cigars, leaf tobacco, a horse, liquors, bar-room furniture, an organ, household goods, etc. Part of them were claimed by Hoffman, and part by Mrs. Martin, who introduced evidence tending to show that she obtained the tobacco in dispute and from which the cigars were made, from her father; that her father advanced her money, also, with which she purchased the other goods claimed by her, and that D. G. Martin, her husband, was merely her agent.

Samuel Zimmerman, called by the defendant:

Q. State to the court and jury the conversation you had with D. G. Martin with reference to the transfer of this property to his wife, after this levy.

Objected to by plaintiffs' counsel unless the wife were present, or other interested party for her.

By the court: Objection overruled, and question admitted; exception.⁵

A. Shortly after he was sherifed, I went there and I talked to him about my bill, and he said that he didn't want to cheat me out of my bill, money that I have in him, but he assigned it to his wife on account of Jake Rutt.

The defendant offered in evidence, his judgment against D. G. Martin, upon which his execution had issued.

Objected to.

Statement of Facts.

By the court: Objection, overruled.⁶

The defendant having shown that the existing Internal Revenue certificate for the manufacture of the cigars was in the name of D. G. Martin, the plaintiffs, in order to show that it was immaterial in whose name the certificate was issued, offered in evidence a certificate for the year 1876, in the name of one Abraham M. Martin.

Objected to.

By the court: Objection sustained; exception.⁷

The court, PATTERSON, J., submitted the cause to the jury on the evidence, and after referring to the plaintiffs' affidavit claiming the property, said:

[When they made this affidavit and came into court, then the court, inasmuch as it was denied by Mr. Rutt, framed this feigned issue, that it might be inquired into and ascertained who owned these goods, whether they were David G. Martin's, the debtor's, or whether they were Lydia Martin's]¹ or Mr. Hoffman's; and hence, what you are to try is the issue, to try by a jury the right to certain personal property levied upon by the sheriff on fieri facias, to April Term 1886, No. 89. You have heard all the articles enumerated, which were levied upon. [Now, what you are to try is, the question, who owns these goods. Your inquiry will go to the question as to whether D. G. Martin owned them;]² if he didn't own them, then Mr. Rutt had no right to levy upon them or some of them, or take them as the property of D. G. Martin; because neither Mrs. Martin nor Mr. Hoffman owed Mr. Rutt anything; but if you find they are not D. G. Martin's, why then you will find for the plaintiffs, and if you find that they are D. G. Martin's, or any of them, then you will find for the defendant in this case.

The jury returned a verdict in favor of the plaintiff, Mrs. Martin, for part only of the goods claimed by her, and in favor of the defendant for the goods claimed by plaintiff Hoffman. A rule for a new trial having been discharged, judgment was entered upon the verdict, when Mrs. Martin took this writ assigning as error:

1, 2. The parts of the charge included in []^{1 2}

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5, 6. The admission of defendants' offers.^{5 6}

7. The refusal of plaintiffs' offer.⁷

Mr. H. M. Houser and *Mr. B. F. Davis*, for the plaintiff in error.

Mr. H. C. Brubaker (with him *Mr. A. H. Fritchey*), for the defendant in error.

OPINION, MR. JUSTICE GREEN:

The only assignment of error in this case, which has any merit, is the fifth. The testimony admitted under that assignment consisted of certain declarations of the husband, D. G. Martin. They were offered by the defendant in the issue against the title of Martin's wife who was the plaintiff. The husband was not even a nominal party to the record. The wife was not present when the declarations were made, and they were not part of the *res gestæ* of the transaction to which they related.

They were inadmissible upon any theory. As declarations, they were secondary only, not being the declarations of the plaintiff herself. As the declarations of an agent, they were incompetent because they were not part of the *res gestæ*. But they were fatally incompetent for the entirely independent reason that they were the declarations of a husband offered against his wife. It is enough to know that the law does not permit the direct testimony of the husband against his wife, and as a matter of course it cannot permit his indirect testimony in the form of declarations adverse to her interest. The very point was decided in *Burrell Tp. v. Uncapher*, 117 Pa. 353, where we held the husband's declarations to be inadmissible although he was a party to the record. We said: "He is a formal and not a real party, and as the purpose of the offer was to elicit from him testimony adverse to the claim of his wife, he must be regarded as incompetent to deliver such testimony. "The same is true as to declarations made by him. They could not be given in evidence against his wife." Neither the theory of a conspiracy, nor the fact that the husband was the defendant in the execution under which the goods were sold, helps the question in the least degree. It is still

Syllabus.

the testimony of the husband against the wife, and is interdicted. The fifth assignment of error is sustained and on that the judgment is reversed.

The other assignments have no merit. As a matter of course Rutt's judgment against D. G. Martin was admissible, as it was the foundation of his execution process under which he claimed title. The internal revenue certificate to A. M. Martin in 1876, was altogether too remote and irrelevant to be admitted. Whether the goods in question were the property of Lydia R. Martin was no doubt the true issue of the cause, but as the defendant alleged they were the property of her husband, D. G. Martin, and evidence was given in support of that proposition, it was certainly not error in the court to say to the jury that the question was whether they were David G. Martin's, the debtor's, or whether they were Lydia Martin's.

Judgment reversed and new venire awarded.

S. R. MILLER ET AL. v. JEREMIAH ROHRER.

ERROR TO THE COURT OF COMMON PLEAS OF LANCASTER COUNTY.

Argued May 22, 1889—Decided June 28, 1889.

[To be reported.]

1. A proceeding by attachment under the act of March 17, 1869, P. L. 8. is to be regarded as a personal action, the attachment being intended to secure to the plaintiff a lien in advance, the efficacy of which will depend on the recovery of a final judgment against the defendant.
2. The prior recovery of a final judgment in another proceeding between the same parties upon the same cause of action, is a bar to the recovery of a judgment in the proceeding by attachment; and this, though the defendant in the attachment filed no bond under § 3 of the act.

Before STERRETT, GREEN, WILLIAMS, MCCOLLUM and MITCHELL, JJ.

No. 19 January Term 1889, Sup. Ct.; court below, No. 30 January Term 1886, C. P.

Statement of Facts.

On December 31, 1885, Jeremiah Rohrer brought suit by attachment under the act of March 17, 1869, P. L. 8, against S. R. Miller and John A. Brake, trading as S. R. Miller & Co. By virtue of the writ, a large quantity of the defendants' personal property was attached, when the defendants appeared to the action and pleaded, non-assumpsit. No bond was filed under § 3 of the act.

At the trial of the cause on April 30, 1888, the plaintiff proved by his own testimony an account for goods sold and delivered to the defendants, and that a balance of \$143.81 was due thereon. On cross-examination, the plaintiff admitted that a suit had been brought against the defendants upon the same account before an alderman, and that he had obtained judgment against them in that suit for the same balance; he admitted also, that on August 23, 1887, to No. 46 November Term 1885, of the Court of the Common Pleas, there was a judgment in favor of the same plaintiff against the same defendants, upon the same cause of action. Testimony was then introduced tending to show that after the judgment had been obtained before the alderman, and at or about the time the present attachment proceeding was begun, the defendants had made a fraudulent transfer of their property. The plaintiff then rested.

The defendants offered in evidence the record of No. 46 November Term 1885, C. P., showing an appeal by defendants from the judgment of Wm. J. Forney, Esq., in favor of Jeremiah Rohrer, dated October 26, 1885, for \$143.81; that the appeal was put at issue, and that on August 23, 1887, there was a judgment by consent in open court, in favor of the plaintiff and against the defendants, for \$160.57.

Objected to by the plaintiff.

By the court: Offer refused; exception.¹

No further testimony being offered, the defendants' counsel asked the court to direct the jury to find a verdict for the defendants, under the testimony in the case.

The court, PATTERSON, J., charged the jury saying:

The court is requested to direct the jury to return a verdict for the defendants, under the evidence. Now the court cannot do that, because there is no evidence in favor of the

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defendants, it is all in favor of the plaintiff. [And we instruct you to bring in a verdict for the plaintiff, if you believe the testimony of the plaintiff, which seems to the court not to be contradicted.]² If you bring in a verdict for the plaintiff, it will be for the amount of the claim which he has proven, and which with the interest amounts to \$163.94.

The jury returned a verdict for the plaintiff, as directed. A rule for a new trial having been discharged, judgment was entered on the verdict, when the defendants took this writ, assigning as error:

1. The refusal of defendants' offer.¹
2. The portion of the charge included in []²

Mr. Marriott Brosius (with him *Mr. H. M. North*), for the plaintiffs in error:

From the time the defendants appeared and made defence, the proceeding became and was a mere personal action against the defendants, and subject to be barred by the recovery of a judgment in a personal action previously brought for the same cause: *Brenner v. Moyer*, 98 Pa. 274; *Leiberman v. Hoffman*, 2 Penny. 211.

Mr. G. C. Kennedy (with him *Mr. H. C. Brubaker*), for the defendant in error:

1. The case before us is different from *Brenner v. Moyer*, 98 Pa. 274, in this, that the defendants had given no bond to the sheriff for the recovery of the goods attached, in order to make it a merely personal action against them. The proceeding was in the nature of an action for the establishment and enforcement of a lien against the goods seized by the sheriff under the writ. It is but a security for the original cause of action, and the former judgment will not act as an extinguishment of the lien until its payment. The lien given by the act can be discharged and the property released, only by the defendants giving bond as directed by § 3 of the act.

2. A judgment recovered in any form of action is still but a security for the original cause of action until it be made productive in satisfaction to the party, and, therefore, until then it cannot operate to change any other collateral concurrent

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remedy which the party may have: *Drake v. Mitchell*, 3 East 251; *Bantleon v. Smith*, 2 Binn. 146; *Gordon v. Correy*, 5 Binn. 552; *Shetsline v. Keemle*, 1 Ash. 29; *Chipman v. Martin*, 13 Johns. 240; *Thompson's Case*, 2 Br. 297. The judgment referred to in the defendants' offer, being a judgment by consent, should have no more force and effect than a judgment confessed on warrant of attorney. The case was an older one than the attachment suit in controversy, and for this reason alone it appeared sooner on the trial list.

OPINION, MR. JUSTICE STERRETT:

Two personal actions appear to have been pending between the parties to this contention, at the same time and for the same cause of action. In the first suit, final judgment was entered for plaintiff before the second was called for trial.

The first action was commenced before Alderman Forney, from whose judgment defendants therein appealed, and filed their appeal to No. 46 of November Term 1885. On December 31, 1885, while that appeal was pending, this suit, attachment under the act of 1869, was commenced. In August, 1887, more than eight months before it was tried, judgment in the appeal case was entered in favor of Rohrer, the plaintiff, for \$160.57 and costs. On the trial of this case, in April, 1888, he testified in substance that his claim in both cases was the same. On cross-examination he was shown the bill that was presented before the alderman, as the foundation of his claim, and said: "It is the same money that suit was entered for there, the same amount exactly, \$143.81." Again, on being shown the record of the first suit, *Jeremiah Rohrer v. S. R. Miller & Co.*, No. 46 November Term 1885, he said: "This judgment is for the same amount as that in suit; it was entered August 23, 1887, for plaintiff." After plaintiff rested, defendants offered that record in evidence, but it was rejected. The court was then requested to instruct the jury that, under the evidence before them, their verdict should be for defendants. That was refused, and the jury was substantially directed to find for the plaintiff if they believed his evidence. The result was a verdict in his favor for \$163.94.

The assignments of error are to the action of the court: 1st, in rejecting the record of the first suit, No. 46 November

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Term 1885, and 2d, in directing the jury to find in favor of the plaintiff if they believed his testimony.

As to the first specification we have no doubt the record was competent evidence for defendants below. It tended to prove, still more conclusively, the fact elicited from plaintiff himself, that the cause of action in both suits was the same, etc. As we have seen, the plaintiff below, on cross-examination, testified without objection to every essential fact that would have been shown by the record, if it had been received in evidence. It was of course the best evidence, and as such defendants were entitled to it. In connection with other testimony it would have shown very clearly, if not conclusively, that both suits were for precisely the same cause of action; and, inasmuch as final judgment was entered in the first, before the second was called for trial, that judgment was necessarily a bar to recovery in the latter case.

The learned judge of the Common Pleas appears to have assumed that the proceeding by attachment under the act of 1869 was in no sense a personal action. In that he was mistaken. In *Lieberman v. Hoffman*, 2 Penny. 211, it was held that such proceeding is to be regarded as a personal action. In the class of cases to which the act applies, the attachment is intended to secure the plaintiff by a lien in advance of judgment, but the efficacy of that security depends on the recovery of a final personal judgment. It was also held that the recovery of a final judgment for the same cause of action is a bar, notwithstanding the attachment was issued and served before the commencement of the suit on which the judgment was obtained, and though defendant in the attachment filed no bond.

It is well settled that where two personal actions are instituted between the same parties for same cause of action, a recovery of judgment in one extinguishes the right to recover in the other, and gives to the plaintiff, in lieu thereof, a security of a higher order: *Brenner v. Moyer*, 98 Pa. 274.

It follows from what has been said that the learned judge erred in charging the jury as he did. Aside from the excluded record evidence, the defendants, on the evidence of the plaintiff alone, had a right to insist on a verdict in their favor; and, if the case had been submitted to the jury on the questions of fact which that evidence alone tended to establish, the jury

Statement of Facts.

would have been warranted in finding in favor of plaintiffs in error. The assignments of error are both sustained.

Judgment reversed, and a venire facias de novo awarded.

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DAVID MARTIN v. JACOB M. FRANTZ.

ERROR TO THE COURT OF COMMON PLEAS OF LANCASTER COUNTY.

Argued May 22, 1889—Decided June 28, 1889.

[To be reported.]

1. An agreement—without other consideration—to accept a smaller sum in satisfaction of a larger one, presently due, cannot be enforced, and the actual acceptance of such smaller sum is not a good discharge of the debt, even as accord and satisfaction.
2. The fact that, after agreeing with one of two sureties, in consideration of the receipt of one half of the debt, to release him from further liability, the creditor allows the statute of limitations to bar an action on the obligation against the other surety, discloses no consideration by way of detriment to the promisee, supporting the promise to release.
3. A right of action for contribution between co-sureties does not arise until one of them has paid more than a due proportion of the debt, and until then the statute of limitations does not begin to run between them; wherefore, such right is unaffected by the fact that the statute may have barred any direct liability of the other surety to the creditor.

Before STERRETT, GREEN, WILLIAMS, MCCOLLUM and MITCHELL, JJ.

No. 377 January Term 1889, Sup. Ct.; court below, No. 17 February Term 1888, C. P.

On January 17, 1888, Jacob M. Frantz brought assumpsit against John U. Charles, David Martin and B. U. Charles, to recover a balance of \$700, with interest, remaining unpaid upon a promissory note for \$1,400, dated April 1, 1879, drawn by the defendants and payable one year after date to the order of John B. Eshbach, and indorsed by Eshbach to the plaintiff.

Charge of Court below.

The defendants pleaded, non-assumpsit, payment, and the statute of limitations.

At the trial on February 5, 1889, the following facts were made to appear:

The note in suit was given to Eshbach for \$1,400 borrowed from him by John U. Charles, who was the principal debtor, the other defendants being sureties. Interest on the loan was paid annually to Eshbach by John U. Charles until 1884, when he became insolvent and made no further payments. On April 1, 1886, David Martin, through his son, John M. Martin, paid to Eshbach the interest for one year, from April 1, 1884, to April 1, 1885, and \$700, the one half of the principal. Eshbach indorsed and delivered the note to Jacob M. Frantz, the plaintiff, on January 1, 1888.

David Martin, one of the defendants, testified in support of a personal defence, that in a conversation which he had with Eshbach in March, 1886, the latter agreed that upon receiving payment from Martin of one half the balance of the debt, he would release Martin from all liability, and that the money to pay Eshbach was subsequently sent to him through witness's son. John M. Martin, the son, testified that acting for his father he made the payment of April 1, 1886, above mentioned, and stated the circumstances surrounding the payment as follows:

"When I met Eshbach in the hall of the Cooper House, and I said: 'Mr. Eshbach, father sent me to pay his share of the note,' he went back in the room and filled out the check, and I said, 'If I pay you this, it will relieve us of this note altogether,' and he said, 'Yes, that is an understanding between me and your father.' I filled out the check and handed it to him, and then I demanded a receipt to that effect. He said he would write it on the back of the note, that he would look to the Charleses if they are worth the money. He said, 'this shows plainly that you have paid your part.' That is about all that transpired."

Eshbach called for the plaintiff, denied making any agreement to release David Martin from liability.

At the conclusion of the testimony, the court, LIVINGSTON, P. J., charged the jury as follows:

Charge of Court below.

This is an action brought to recover the balance due on a note held by the plaintiff against the defendants. The note has been presented; it was made by the defendants and payable to John Eshbach. It has been in part paid, the last payment, \$770, being made by Martin. There is still a balance due.

One of the defendants, B. U. Charles, has paid nothing at any time. He has entered the plea of the statute of limitations, that is, that he made no promise to pay within six years. Plaintiff has furnished no proof that he has so promised, and therefore no verdict can be rendered against him; he is free.

John U. Charles paid the interest on the note up to 1885, and David Martin, long after the note became due, and just before the statute of limitations would have become a bar, on April 1, 1886, paid on it 770 [including interest]. These payments prevented the statute from becoming a bar as to them, and therefore, they cannot invoke its benefits; and unless there be found something else to relieve them, they still remain liable.

[It is claimed here by defendants that there is an accord and satisfaction in this case. In our judgment, accord and satisfaction do not arise here; are not presented by the evidence in the case.]⁴ Accord and satisfaction arise, and are presented, where there enters a consideration which is something new, or different from that to which the creditor was already entitled. The law will not pause to inquire or examine in such case whether the right he acquires is more or less valuable than that which he relinquishes.

* * * * *

Under our old system of pleading, accord and satisfaction would have had to be specially pleaded, and in such case it would have been necessary to set out the particulars fully, and allege that the matter set out in the special plea was accepted in full satisfaction of the debt or claim. Since special pleading in assumpsit has been abolished, I presume such matter may be presented by an affidavit of defence, or the rules as to special matter. I do not know what method was taken here.

* * * * *

[What was David Martin's position? He never was released by the operation of the statute of limitations. He made a

Charge of Court below.

payment just before it would have become operative, that kept it alive as to him for six years longer. It required no new promise to bind him. At the time he paid the half, he was bound for the whole. Is there any other relief for him? He might have paid the whole at any time prior to the time he paid the \$770; he might have paid it all then and brought suit against Charles for contribution. Take David Martin's statement as entirely true, and we believe it is, though contradicted by Eshbach as to releasing.]⁵ What is it? He tells you that he and Eshbach met on the Wabank road in March, 1886, and Eshbach asked him about the note; and he promised, if he possibly could, to pay his share of the note that spring, and Eshbach said if he did he would release him (this Eshbach denies), and he afterwards sent his son to pay the money on April 1, 1886; paid \$770. Does it release him? Taking everything he states to be true, does it release him in law?

A surety will not be discharged by a delay of the creditor to sue the principal. He will not be discharged by part payment from the principal. Mere delay and passiveness of the creditor does not discharge a drawer or indorser, even when the delay and subsequent insolvency of the principal deprives him of all means of reimbursement; he must still submit to it; he has no means of relief. In this case Martin might have done one of two things to save himself. He might have compromised as permitted by §§ 1, 2, 3, 4, 5, act of March 22, 1862, P. L. 167; or, he might have paid the whole note, and then himself brought suit against Charles for contribution. He might have saved himself in that way. He did not do so; he simply paid, as he says, his share on the promise of Eshbach to release him.

The courts say the law is that, a part payment of a bill or note which has fallen due, only extinguishes it pro tanto, and an agreement that it shall be in full discharge of the debt, does not make such part payment any more effectual as to the residue. . . .

[And this being our view of the law, we therefore instruct you to render your verdict for the plaintiff, for the amount of his claim, the balance of the note with the interest due thereon, the whole amount being \$861.70.]⁶

The plaintiff requests the court to charge:

Charge of Court below.

1. The alleged promise or agreement testified to by David Martin, and some of defendants' witnesses, as having been made by John B. Eshbach, to the effect that he, David Martin, was to be relieved or discharged from all further liability on the payment of the half of the note in suit, being based on no valuable consideration, is not binding either on John B. Eshbach, or Jacob M. Frantz, the plaintiff in this case. Therefore said part payment is no defence to this suit which is brought to recover the balance, and the verdict of the jury must be for plaintiff and against David Martin and John U. Charles.

Answer: Affirmed.¹

The defendant, Martin, requests the court to charge:

1. That the liability of David Martin on the note in controversy would have been barred by the statute of limitation and himself relieved if he had not made the payment, to wit: \$770, on April 1, 1886.

Answer: Refused.²

2. That if the jury believe, from all the evidence, that at the time said payment was made, to wit: \$770, on April 1, 1886, the distinct understanding and agreement was that he was to be discharged and relieved from all other liability on said note, then he is relieved and the plaintiff cannot recover against him.

Answer: Refused. Six years bars recovery. If payment had not been made within six years, the statute would have been a bar, but payment was made within six years and the statute did not become a bar, but continued the note for six years more, unless he was relieved by payment or otherwise.³

The jury rendered a verdict for the plaintiff against John U. Charles and David Martin for \$861.70. Judgment having been entered David Martin took this writ, assigning for error:

1. The answer to plaintiff's point.¹

2, 3. The answers to defendant's points.^{2 3}

4-6. The parts of the charge included in []^{4 5 6}

Mr. Philip D. Baker, for the plaintiff in error:

1. "The rule that the payment of a less sum of money, though agreed by the plaintiff to be received in full satisfaction of a debt exceeding that amount, shall not be so considered in contemplation of law, is technical and not very well sup-

Arguments.

ported by reason. Courts, therefore, have departed from it upon slight distinctions:" *Cumber v. Wane*, 1 Sm. L. C. 561. This doctrine has been held good in Pennsylvania: *Mechanics Bank v. Huston*, 11 W. N. 389; *Brockley v. Brockley*, 122 Pa. 1.

2. In this case we claim the distinction and consideration that prejudice to the defendant David Martin was present. The payment made by him was obtained from him by a promise that he should be released and his co-surety alone pursued. The co-surety was not pursued, but has become discharged by the statute of limitations, and Martin's right to contribution is thus gone. Any detriment to the promisee is a good consideration: 1 Whart. on Cont., 505; *Walstrom v. Hopkins*, 103 Pa. 118. The contract we rely on, was therefore not nudum pactum, but a good accord and satisfaction.

Mr. W. R. Wilson (with him *Mr. And. M. Frantz*), for the defendant in error:

1. It is well settled that part payment of an undisputed overdue debt is not a good accord and satisfaction, and an agreement that it shall satisfy the whole and release the debtor is nudum pactum: *Byles on Bills*, Sharswood, *180, n. 1; *Wheeler v. Wheeler*, 11 Vt. 60; *Brockley v. Brockley*, 122 Pa. 1; *Walstrom v. Hopkins*, 103 Pa. 118; *Rumberger v. Golden*, 99 Pa. 34; *Rice v. Morris*, 4 Wh. 249; 2 *Daniel on Neg. Inst.*, §§ 1289, 1327; *Cumber v. Wane*, 1 Sm. L. C. *439-470; *Hartman v. Danner*, 74 Pa. 40. But the whole testimony for the defendant, taking every word of it as true, fails to make out a contract to release Martin.

2. Whether Martin has a right to contribution or not, does not affect our right to recover against him. His whole position is based on a fallacy. The fact that, as between the plaintiff and B. U. Charles, the latter successfully interposed the statute of limitations as a defence against the suit upon the note, will not prevent Martin, after paying it off, from recovering against Charles in a suit for contribution. The right to contribution, and the right of action therefor, do not arise as between co-sureties until one of them has paid more than his share of the debt, and consequently the statute of limitations does not begin to run between them until then: 1 *Pars.* on

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Cont., 5th ed., 35, 36; *Peaslee v. Breed*, 10 N. H. 489 (34 Am. Dec. 178); *Boardman v. Paige*, 11 N. H. 431; *Howe v. Ward*, 4 Me. 195.

OPINION, MR. JUSTICE MITCHELL:

It is too well settled to admit of discussion that an agreement to accept a smaller sum in satisfaction of a larger one, presently due, is without consideration and cannot be enforced; *Brockley v. Brockley*, 122 Pa. 1; and the actual acceptance of such smaller sum is not a good discharge of the debt, even as accord and satisfaction: *Mechanics Bank v. Huston*, 11 W. N. 389.

It is clear, therefore, that the agreement relied on by the defendant below was without consideration in the way of benefit accruing to the plaintiff, and it must fail as a defence unless it imposed some burden or disadvantage on the defendant. All that is claimed for it in this regard is, that it allowed the statute of limitations to run in favor of the co-surety, B. U. Charles, and thus deprived defendant of his right to contribution. The authorities, however, are quite uniform that this result does not follow.

"The right of action for contribution does not arise until payment of more than a due proportion, and hence the statute of limitations does not begin to run until then:" *De Colyar on Guaranties*, 354, *Morgan's Am. ed.*; and see *Parsons on Contracts*, pp. 33-37, and cases there cited.

The precise point involved here has been expressly decided by several courts of the highest authority. Thus in *Peaslee v. Breed*, 10 N. H. 489, one of two joint makers of a note was protected against the holder, by the statute of limitations, while the other, through payments made by himself, remained liable. The latter having paid, was held entitled to recover of the former his share for contribution, *PARKER, C. J.*, saying, "We are of opinion that the plaintiff is entitled to recover for the amount paid after the period when no action could have been sustained directly against the defendant by the payee of the note."

In *Boardman v. Paige*, 11 N. H. 438, the rule is thus stated: "When one promisor still continues liable and is compelled to pay the liability of the co-promisors for con-

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tribution will still remain, notwithstanding they may be discharged by the operation of the statute of limitations, from their liability to the promisee."

In *Wood v. Leland*, 1 Metc. (Mass.) 387, it was said by Chief Justice SHAW, "Defendants contend that as they could not be held responsible to the obligee after the year, so they would not be liable for contribution to a surety after that time. But the court are of opinion that the statute of limitations cannot be so applied. It may well be admitted that the statute of limitations would be a good bar to an action by the obligee; but the right of action by the surety for contribution does not accrue at the breach of the bond, but upon his payment of the money pursuant to that breach."

And in *Camp v. Bostwick*, 20 Ohio St. 347, it was held that the right to contribution does not arise directly from the original instrument of joint obligation, but from the equity of one who has borne more than his just share of a joint burden, and "this equity having once arisen between co-sureties," says McILVAINE, J., "neither the creditor, the principal, the statute of limitations, nor the death of a party can take it away."

It is thus clear on the authorities that whatever rights of contribution plaintiff in error may have, arise out of his payment of more than his due proportion of the joint obligation, and will date from such payment, entirely unaffected by the fact that the statute of limitations has barred any direct liability of his co-surety to the creditor.

The agreement relied on being therefore without consideration, either by way of advantage to the plaintiff or disadvantage to the defendant, was not a valid defence, and the learned judge was right in directing a verdict for plaintiff.

Judgment affirmed.

Decision of Court below.

COAL RIDGE I. & C. CO. v. W. W. JENNINGS.

127 397
145 87

ERROR TO THE COURT OF COMMON PLEAS OF NORTHUMBER-
LAND COUNTY.

Argued May 27, 1889—Decided June 28, 1889.

1. The provisions of § 4, act of June 30, 1885, P. L. 193, requiring the treasurers of corporations to assess a three mills tax upon the nominal value of corporate loans, to deduct the same from the interest paid thereon, and to return it into the state treasury, are not in violation of § 1, article IX. of the constitution of Pennsylvania, providing that all taxes shall be uniform upon the same class of subjects.
2. Nor is the said act of June 30, 1885, or said § 4, in violation of article V. or article XIV. of the amendments to the constitution of the United States, or to § 9 of article I. of the constitution of Pennsylvania, providing that no person shall be deprived of life, liberty or property without due process of law.

Before PAXSON, C. J., STERRETT, GREEN, CLARK and WILLIAMS, JJ.

No. 364 January Term 1888, Sup. Ct.; court below, No. 25 February Term 1888, C. P.

On December 7, 1887, W. W. Jennings brought assumpsit against the Coal Ridge Improvement and Coal Company, to recover interest upon corporate bonds made by the defendant company. Issue.

On December 23, 1887, the case was submitted to the court without the intervention of a jury, under the act of April 22, 1874, P. L. 109, and on February 28, 1888, the court, MAYER, P. J., filed the following decision:

From the evidence I find the following facts:

W. W. Jennings, the plaintiff, is a resident of Harrisburg, Pa., and was the owner on December 1, 1887, of forty first mortgage bonds, of the denomination of \$500 each, making \$20,000, of the Coal Ridge Improvement and Coal Company, the defendant, a corporation of the state of Pennsylvania, doing business in the county of Northumberland. By the terms of these bonds, which were registered, and the mortgage securing the same, there was due the plaintiff on December 1, 1887,

Decision of Court below.

the sum of \$600, being six months interest on said bonds. The plaintiff made demand upon the company for the payment of this interest, to wit, the sum of \$600, to which defendant responded by tendering to the plaintiff the sum of \$570, being the interest less the sum of \$30, which the defendant claimed to deduct as a tax of three mills upon the nominal value of the bonds. This tax was deducted under the provisions of an act of assembly approved June 30, 1885 [P. L. 193], entitled, "A further supplement to an act, entitled an act to provide revenue by taxation," approved June 7, 1879.

The first section of the act of June 30, 1885, is an exact copy of the seventeenth section of the act of June 7, 1879 [P. L. 112], and the first section of the act of June 10, 1881 [P. L. 99], with the exception of the omission of bank shares, which are made the subject of a separate section, the second section. Under these two sections of the acts of 1879 and 1881, it has been decided by the Supreme Court in the case of the Commonwealth v. Lehigh V. R. Co., 104 Pa. 89, that the word "value" as used in these acts meant the actual value, and not the nominal or par value, of bonds and mortgages, and that a legal ascertainment of that value was essential to the assessment of a valid tax.

I find as a fact, that the actual value of the bonds of the Coal Ridge Improvement and Coal Company is not greater than three fourths of their par value, and that the interest on the bonds of said company of late years has been paid from the earnings of that portion of this company's property not covered by the mortgage. I find also from the evidence that the actual value of corporation securities held by individuals differs from their nominal or par value. In some cases it is below and in other cases above par. I further find that the securities issued by foreign corporations not doing business in Pennsylvania and held by residents of Pennsylvania, and those issued by individuals and owned in Pennsylvania, are assessed at their actual value. I further find that there are a great many bonds of foreign corporations not doing business in Pennsylvania, held by residents of Pennsylvania, the actual value of many of which bonds is much below their par value.

The court then discussed at length the act of June 30, 1885,

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and held that the fourth section thereof was unconstitutional because: (1) It was in violation of section 1 of article IX. of the constitution of Pennsylvania, which requires that "All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the same," and (2) It was in violation of article XIV. of the amendments to the constitution of the United States, which provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The court further held that the said act of June 30, 1885, was unconstitutional because also, (1) It was in violation of section 9, article I. of the constitution of Pennsylvania, which provides that "no person shall be deprived of his life, liberty or property, unless by the judgment of his peers, or the law of the land," and (2) It was in violation of article V. of the amendments to the constitution of the United States, which provides that "no person shall be deprived of life, liberty or property, without due process of law."

Exceptions to this decision were overruled by the court, and judgment was entered in favor of the plaintiff for \$600. Thereupon the defendant took this writ, assigning for error *inter alia*, that the court erred in holding that the act of June 30, 1885, was unconstitutional.

Mr. S. P. Wolverton, for the plaintiff in error.

Mr. M. E. Olmsted, for the defendant in error.

PER CURIAM:

The question presented by this record has been so recently considered and discussed, that any further comments are unnecessary. See cases of *Commonwealth v. Del. Div. Canal Co.*;* *Commonwealth v. Lake Shore & Michigan Southern Ry. Co.*; *Commonwealth v. City of Chester*† and *Common-*

* 123 Pa. 594.

† 123 Pa. 626. The other cases referred to were not directed to be reported.

Statement of Facts.

wealth v. Bell's Gap Railroad Co. These cases were so recently decided that they have not yet appeared in our State Reports, but see 23 W. N. 216.

Judgment reversed and judgment is now entered in favor of the plaintiff below for \$570 and costs.

J. W. CAKE ET AL. v. H. L. CAKE ET AL.

ERROR TO THE COURT OF COMMON PLEAS OF NORTHUMBER-
LAND COUNTY.

Argued May 27, 1889—Decided June 28, 1889.

- (a) A mortgage, by a clerical error, described certain lots conveyed as in block 17 instead of in block 7. The description of the lots, both as to boundaries and improvements, could apply only to lots in block 7. After the mortgagor died, a decree re-forming the mortgage was obtained by bill in equity, all the heirs being made parties.
1. In such case, whether notice of the proceeding in equity to an heir as an heir did or did not bind him as a judgment creditor was immaterial, for the mortgage, as to an heir familiar with the property for years and whom the misdescription could not deceive, was a valid conveyance without re-formation.

Before PAXSON, C. J., STERRETT, GREEN, CLARK and WILLIAMS, JJ.

No. 94 July Term 1888, Sup. Ct.; court below, No. 6 May Term 1888, C. P.

On February 6, 1888, an action of ejectment was begun by Henry L. Cake, A. H. Stone and David Taggart, trustees of the First National Bank of Northumberland against Joseph W. Cake, Jr., Joseph R. Leisenring, John Poff, Robert Jones, Henry S. Neff, Samuel Lugar and Isaac Slack, by filing a certified record of the proceeding had before a justice of the peace to obtain possession of certain real estate in the borough of Sunbury, Pa., after a sheriff's sale thereof to the plaintiffs. Declaration in ejectment filed and issue.

Statement of Facts.

At the trial on May 8, 1888, the facts appearing were in substance as follows:

On December 10, 1877, Joseph W. Cake, Sr., executed and delivered to the plaintiffs a mortgage, duly recorded, for \$25,000, upon a number of lots in Cake's addition to Sunbury, including the lots in question which were described as follows: "Also the following described pieces of property, being lots four (4), five (5), six (6), seven (7), eight (8), and nine (9), in block seventeen (17), fronting on Susquehanna avenue, each twenty-five (25) feet in width, and extending west each of that width one hundred and fifty (150) feet to Fort Augusta avenue, upon which said lots are twelve (12) two and a half (2½) story frame dwelling houses, covered with slate and metal roofs with one story back kitchen attached."

On May 9, 1878, the Northumberland County National Bank for the use of W. H. M. Oram, receiver of said bank, obtained a judgment against the said Joseph W. Cake, Sr., for the sum of \$4,588.12, which judgment was assigned to Joseph W. Cake, Jr., on March 19, 1881.

On June 1, 1879, Joseph W. Cake, Sr., died, intestate, and on July 10, 1882, the plaintiffs issued a scire facias on their mortgage, which was duly served. It was afterwards discovered that by a clerical mistake in the mortgage, the above-mentioned lots were stated to be in block 17, while in fact they were in block 7, when the plaintiffs discontinued the proceeding on the scire facias, and on March 10, 1884, filed a bill in equity to re-form the mortgage, making the administrator and all the heirs of Joseph W. Cake, Sr., parties defendant thereto, all of whom, including said Joseph W. Cake, Jr., were duly served. A rule was also issued and duly served upon him and them to file their plea, answer or demurrer within thirty days from the service of the rule. At the expiration of this time no plea, answer or demurrer having been filed to the bill of complaint, on September 9, 1884, a decree was made against the defendants, including the plaintiff in error, correcting the numbering of the block from 17 to 7.

An alias scire facias was then issued on the mortgage, judgment obtained June 29, 1886, a writ of levavi facias issued and the property sold thereon to the plaintiffs on September 15, 1886.

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Proceedings were then instituted before a justice to obtain possession when Joseph W. Cake, Jr., made affidavit that he claimed the property, not under the defendant, but by a different title, as follows: Prior to the judgment on the said mortgage, the lots in dispute were levied upon, condemned and sold by the sheriff on proceedings under the judgment which had been assigned to the said Joseph W. Cake, Jr., who became the purchaser and received the sheriff's deed therefor, dated May 14, 1886. The proceedings were then certified into the Court of Common Pleas.

The plaintiff offered in evidence the record of the mortgage, the proceedings on the writs of scire facias, and on the bill in equity.

Objected to, substantially, on the ground that the mortgage was not a lien on the property in suit; or, if it ever became so, it was after defendant Joseph W. Cake, Jr., had become the owner of the above judgment, without notice; for the decree re-forming the mortgage had not been duly recorded in the recorder's office, and notice of the proceeding in equity to said Joseph W. Cake, Jr., as an heir, was not notice to him as a judgment creditor of the decedent.

By the court: Objection overruled; exceptions.^{1 2 3}

The defendant offered the record of the proceedings on the judgment No. 889 June Term 1877, with the return of the sheriff's sale and deed finally made therein.

Objected to by the plaintiff, because the lien of the judgment was subsequent to the lien of the mortgage, and because the judgment in the alias scire facias related back to the date of the mortgage.

By the court: Objection sustained; exception.⁴

It was proved that Susquehanna avenue is the principal street in Cake's addition, and that lots in block 17 of the same number as those in suit, fronted on Railroad avenue and ran west 150 feet, to an alley not named in the plan, and had but one frame house built upon them when the mortgage was given.

At the conclusion of the case on the evidence, the court, ROCKEFELLER, P. J., charged the jury, inter alia, as follows:*

[The contention of the defendant is, that he had obtained a judgment against Joseph W. Cake, the mortgagor, entered

Charge of Court below.

prior to the entry of this mortgage, to wit, on May 9, 1878. He offered in evidence the fact that, on May 9, 1878, about five months after the mortgage was executed by Joseph W. Cake, the Northumberland County National Bank, for the use of W. H. M. Oram, receiver, recovered a judgment for some \$4,588.50 against Joseph W. Cake, the mortgagor, and that this judgment was assigned to him on March 19, 1881. He offered this in evidence, to be followed by a sale by the sheriff to him of the lots in dispute, contending that it ought to be received upon the ground that the re-formation of this mortgage did not take place until subsequent to the obtaining of this judgment by the Northumberland County National Bank and subsequently to its being assigned to him. He further contended that he had no notice at the time that this judgment was obtained, that there was an error or mistake in this mortgage. Now, gentlemen of the jury, that evidence was rejected. Whilst it is true that where there is an error in a mortgage and a mistake that would be corrected by the parties to it immediately upon discovery, yet that cannot affect an innocent judgment creditor who parted with his money without knowledge of the fact that there was a vice or a mistake in the mortgage. But in the case on hand, this mortgage was re-formed after the judgment had been obtained, and after it had been assigned to Joseph W. Cake, Jr., and after notice was given him by this bill in equity. It is true, he was only named in that bill in equity as an heir, or a legal representative of Joseph W. Cake, the mortgagor; but, notwithstanding the fact that notice was given to him simply in that character, we are of the opinion that he had a right and that it was his bounden duty, whilst this bill in equity was pending, to set up any defence he might have to the re-formation of this mortgage. He failed to do that. The result was that a decree was entered against him, which was binding upon him, and affected him with the re-formation of the mortgage, so that so far as his right under the judgment is concerned, he is to be treated with knowledge of it in the beginning. The decree stands until it is reversed, and so long as that record stands he is estopped from disputing it.]⁵

* * * * *

[It is conceded and admitted that the plot of Caketown was

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not recorded. The mortgage being the prior lien upon the lots in Caketown, it was the duty of a subsequent incumbrancer before he parted with his money to go upon the ground and examine for himself the description of the lots given in the mortgage. Had this been done, it would have been seen from the adjoiners called for in the mortgage, and the description of the buildings called for, twelve two and one half story frame dwelling houses with slate and metal roofs, with one story brick kitchen attached, that they were located in block No. 7, and that neither the building on block No. 17, nor the adjoiners, would answer the description in the mortgage. Thus he would have seen that the lots in dispute were covered by the mortgage. In the absence of a recorded plot of Caketown, it was the duty of a junior incumbrancer to go upon the ground and examine. Hence we instruct you to find in favor of the plaintiffs the lands that are described in the declaration filed, if you believe the uncontradicted evidence of the plaintiffs.]⁶

The jury returned a verdict in favor of the plaintiffs for the lands in suit and for \$525 as damages for the unlawful detention thereof, and judgment was entered on the verdict. Thereupon the defendants took this writ, assigning as error:

1-3. The admission of the plaintiffs' offers.^{1 to 3}

4. The refusal of the defendants' offer.⁴

5, 6. The parts of the charge included in []^{5 6}

Mr. George B. Reimensnyder (with him *Mr. L. H. Kase*), for the plaintiffs in error.

Mr. S. P. Wolverton, for the defendants in error.

PER CURIAM:

There is no merit in the case of the defendants below (plaintiffs in error). The sale under the mortgage passed a good title to the plaintiffs for the premises in dispute. It is true there was an admitted error in the description of the property as contained in the mortgage. It describes the lots in question as part of block No. 17, when in point of fact they formed a portion of block No. 7. This error was not discovered until after

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a scire facias had been issued on the mortgage. A bill in equity was then filed to re-form that instrument. Notice of this proceeding was given to the administrator and heirs of the deceased mortgagor, and a decree was finally made re-forming the mortgage to the extent of altering the description contained therein, so far as the number of the block was concerned. It was changed from block No. 17 to block No. 7 to conform to the facts. Upon the mortgage so amended a sale was subsequently made by the sheriff and the title thus acquired was held by the plaintiffs below at the time of trial.

Prior to the decree of re-formation, J. W. Cake, Jr., defendant below, became the owner of a judgment recovered against the mortgaged premises. He was also an heir and was a party to the bill. He now alleges that even if he was bound by the decree as an heir, he is not bound as a judgment creditor; that notice to him in the one capacity does not bind him in the other. This distinction is somewhat refined. We need not discuss it, however, as we regard the mortgage as perfectly good without any re-formation. The misdescription of the block could have misled no one. The property was described as lots 4, 5, 6, 7, 8 and 9 in block No. 17, fronting on Susquehanna avenue, each 25 feet in width, and extending west each of that width, 150 feet to Fort Augusta avenue, upon which said lots are erected twelve two and a half story frame dwelling houses, etc., etc. All of this description is accurate excepting the number of the block, which, as before stated, was No. 7 instead of 17. Lots Nos. 4, 5, 6, 7, 8 and 9 in block No. 17 front on Railroad avenue, and run back to an alley not named on the plan. How this error could have deceived any one, least of all, J. W. Cake, one of the heirs, who knew all about it, and had resided within three squares of this block for years, passes comprehension. It is not necessary to consider the assignments in detail.

Judgment affirmed.

On October 14, 1889, a motion for a re-argument was refused.

PENNSYLVANIA R. CO. v. MARY SELLERS.

ERROR TO THE COURT OF COMMON PLEAS OF PERRY COUNTY.

Argued May 27, 1889—Decided June 28, 1889.

In an action against a railroad company to recover damages for personal injuries, it appeared that the injuries were inflicted upon the track and by the engine and cars of another company. There was no direct testimony that the road of such company was then owned or leased by the defendant; yet, there being evidence of facts and circumstances sufficiently tending to show that the defendant then operated it, it was not error to submit the question of defendant's responsibility to the jury.

Before PAXSON, C. J., STERRETT, GREEN, CLARK and WILLIAMS, JJ.

No. 96 July Term 1888, Sup. Ct.; court below, No. 29 April Term 1886, C. P.

On March 6, 1886, Mary J. Sellers brought case against the Pennsylvania Railroad Company, to recover damages for personal injuries to her husband, George W. Sellers, resulting in his death, charged to the negligence of the defendant company's employees. Issue.

At the trial on January 19, 1888, the facts made to appear were in substance as follows :

On November 29, 1885, George W. Sellers, the plaintiff's husband, while passing over a public crossing of a railroad track was struck and killed by the hindmost of two cars which a shifting engine was backing down over the crossing to couple with other cars below. There was a network of tracks at this crossing, and the main question in dispute was, whether the defendant company, or the Northern Central Railway Company, was responsible for the accident.

The accident occurred upon the line of the Northern Central Railway Company, which company owned the engine and cars causing it. There was no testimony showing directly that the defendant company then owned or had leased the railroad of the Northern Central Railway Company; but, as evi-

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dence that the train employees who had charge of the engine and cars which caused the accident, were the employees of the defendant company, the plaintiff adduced testimony to the effect that the rolling stock of the two roads was used indiscriminately on either line; that the trainmen on either line wore uniform clothing marked with the insignia of the defendant company; that tickets over the Northern Central line were sold by the defendant company; that the Northern Central line had been divided and one part was called a division of defendant company's road; that the principal officers of the two roads were the same persons; that the employees running the train which caused the accident were members of the Penna. R. R. Relief Association, to which employees of the defendant company only could belong; that the general freight department of defendant company issued orders to agents on the Northern Central line, and that printed publications of defendant company referred to the Northern Central Railway as a road leased, operated and controlled by the defendant company. Testimony explanatory and in rebuttal of that on the part of the plaintiff was introduced by the defendant.

The court, BARNETT, P. J., submitted the evidence upon all the disputed questions of fact to the jury, and concluded the charge as follows:

[And then you will consider whether the persons, who shifted the cars, were the employees of the defendant, the Pennsylvania Railroad Company; if they were not, then no matter who else might be responsible, this defendant is not, and your verdict should be for the defendant. But if, under all the evidence in this case, you should find that the persons who shifted the cars did so as employees and under the authority of the Pennsylvania Railroad Company, then your verdict should be in favor of the plaintiff.]⁶

The defendant requests the court to charge:

1. That there is no evidence whatever offered by the plaintiff to show that the defendant either owned or was the lessee of the Northern Central Railway.

Answer: Affirmed.

4. That the accident which resulted in the death of Sellers occurred in the yard of the Northern Central Railway Com-

Charge of Court below.

pany, at Marysville, and upon the tracks of the said Northern Central Railway Company, from a shifting engine of the said Northern Central Railway, operated by employees of said railway company, with which the Pennsylvania Railroad Company had no connection whatever; that she ran no trains over the tracks where the accident occurred, nor any trains upon the Baltimore Division, extending from the city of Baltimore to said yards of the Northern Central Railway Company where the accident occurred; and that the jury is bound to find the fact to be that the Pennsylvania Railroad Company neither operated nor controlled the said Baltimore Division of the Northern Central Railway; and, that although it should be established by the evidence, both that the Pennsylvania Railroad Company operated and controlled the Susquehanna Division of said Northern Central Railway Company, extending from Rockville to Sunbury, the said Pennsylvania Railroad Company would not be liable for any injury which said Sellers received on said Baltimore Division, which it neither leased nor controlled, and hence there can be no recovery against the defendant in this action.

Answer: This calls for binding instructions which would take the case from the jury. But we think there is some evidence in this case which the jury should pass upon, and therefore we decline to affirm this point as presented.¹

6. That unless the train which did the injury, by the negligence of those in charge of the same, was a train run by the authority of the corporation known as the Pennsylvania Railroad Company, no action would lie against the latter company; and as the plaintiff's evidence shows that the shifting train in the Marysville yard which killed Sellers, was a train run by the employees of the said Northern Central Railway in its corporate name, this plaintiff cannot recover.

Answer: The first part of this point is correct, but we decline to affirm it as presented.²

The jury rendered a verdict in favor of plaintiff for \$3,000. A rule for a new trial having been discharged, judgment was entered on the verdict, when the defendant took this writ, assigning as error, *inter alia*:

1, 2. The answers to defendant's points.^{1 2}

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6. The part of the charge included in []⁶

Mr. B. F. Junkin, for the plaintiff in error.

Mr. W. H. Sponsler (with him *Mr. J. L. M. Markel*, *Mr. W. A. Sponsler* and *Mr. Chas. H. Bergner*), for the defendant in error.

PER CURIAM:

It is not disputed that the accident, by means of which George W. Sellers lost his life, occurred in the yard of the Northern Central Railway Company, at Marysville, upon the track of the said company, and from one of its shifting engines. This suit was brought against the Pennsylvania Railroad Company by the widow of said Sellers, to recover compensation for his death, upon the ground that it was caused by the negligence of the last-named company. There was no evidence that said company was either owner or lessee of the Northern Central Railway. There was some evidence tending to show that the Northern Central was operated by the Pennsylvania Railroad Company. It was not very strong or satisfactory, but was as much so as the evidence in *Penna. R. Co. v. Spicker*, 105 Pa. 142 and *Young v. Railroad Co.*, 115 Pa. 112, in which cases substantially the same question was considered. The writer doubted the sufficiency of the evidence to connect the two roads in each of those cases, and for that reason did not agree to the judgment although no dissent appears. That is of no possible moment now, however, and it is not proposed to question their authority. It is sufficient to say that under the ruling of those cases this judgment must be affirmed, as the measure of proof here is fully up to the standard there laid down. We need not discuss the testimony in detail. To go over 150 pages, printed in small type, for this purpose, would be a consumption of time that can be better employed.

Judgment affirmed.

APPEAL OF W. A. SPONSLER.

[ASSIGNED ESTATE OF W. C. KING.]

FROM THE DECREE OF THE COURT OF COMMON PLEAS OF
PERRY COUNTY.

Argued May 27, 1889—Decided June 28, 1889.

[To be reported.]

1. When a judgment in favor of A., against himself and others, after being assigned by A. to B., is revived in favor of B., the fact that A. occupies the position of legal plaintiff does not prevent such revived judgment from being good against A. and his creditors.
2. Creditors cannot attack a judgment before an auditor for distribution, on the ground that it is a fraud upon the debtor. They can make such attack only when the judgment has been fraudulently given by collusion, for the purpose of hindering and delaying them.

Before PAXSON, C. J., STERRETT, GREEN, CLARK and WILLIAMS, JJ.

No. 102 July Term 1888, Sup. Ct.; court below, No. 210 November Term 1885, C. P.

On December 30, 1885, W. C. King, with Martha his wife, executed and delivered to W. A. Sponsler a deed of voluntary assignment for the benefit of creditors.

On July 12, 1887, the assignee having settled an account showing a balance in his hands as of the proceeds of sales of the assigned real estate sold discharged of liens, *Mr. James W. Shull*, was appointed auditor to make distribution thereof.

At the audit, the fund arising from the sale of certain real estate, amounting to \$880.20, was claimed by the Susquehanna Building and Loan Association by virtue of a judgment for \$1,500, originally entered in favor of W. C. King, the assignor for benefit of creditors, against himself and others, and shortly afterwards assigned by him to the building and loan association, to whose use it was twice subsequently revived. The accountant, W. A. Sponsler, also claimed this fund under a judgment in his favor and against said W. C. King, the original entry of which, to No. 59 October Term 1885, was between the dates of the first and second revivals of the building association's judgment.

Auditor's Report.

Upon the controversy thus arising the auditor reported as follows :

On April 1, 1873, Susan King, W. C. King, S. S. King and M. Edgar King, widow and heirs of Robt. S. King, deceased, executed a judgment bond to W. C. King in the sum of \$1,500, which bond was entered in the Common Pleas of Perry county, on April 12, 1873, to No. 314 January Term 1873, and on November 14, 1873, for a valuable consideration, W. C. King, by his attorney, assigned, transferred and set over the said judgment to the Susquehanna Building Association, who revived the same to their use by amicable scire facias against all the above-named defendants on April 8, 1878, to No. 532 January Term 1878, and also by a subsequent revival by scire facias, issued April 5, 1883, to No. 62 April Term 1883.

There is no evidence to show that this judgment against W. C. King and others was not a good and valid judgment at the time it was entered; consequently, had an execution been issued thereon at that time, although W. C. King was legal plaintiff, as well as one of the defendants, the same could have been collected, except the proportionate share for which King himself was liable. As where several persons sign a bond payable to one of their number, it cannot be enforced as a joint promise against all the signers, but where such bond is transferred to a third person it immediately becomes operative as a valid contract from the date of the transfer, and may be enforced by a joint action against all the makers: Byles on Bills, 76. Where, however, parties have contrived by judgment to defeat the rights of a third person, such judgment is not a bar against the claim of the party sought to be defrauded. But fraud is not alleged in this case; the technical ground alone, that W. C. King is both legal plaintiff and defendant, consequently no lien attaches, and that any assignee of the judgment could hold no higher position, or acquire other rights than those possessed by the assignor. This, in the opinion of your auditor, is partly true. Had the judgment of W. A. Sponsler been entered prior to November 14, 1873, the date of the assignment of the judgment, the principle of equity would then have prevailed; the legal plaintiff could not hold the lien against his property to the prejudice of a third person, and on distribution the fund would have been applied to his judgment, although the

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same was not first of lien. Now, applying the principle as laid down in *Byles on Bills*, above referred to, immediately after the transfer or assignment by W. C. King to the building association, he, W. C. King himself, becomes liable and his real estate would be bound by the lien of the judgment, the same being of record where subsequent creditors were bound to take notice of it, and therefore could not be misled. See also *Johnson v. McCurdy*, 83 Pa. 282.

Another answer also appears to your auditor most formidable, which was urged by counsel for the building association, viz.: The Susquehanna Building Association twice revived their judgment for their use against W. C. King and others; the first time by amicable scire facias, on April 8, 1878, while the judgment of W. A. Sponsler was not entered until November 10, 1880. The effect of this revival was to continue the lien and vest the title and control of the judgment in the equitable plaintiff against all the defendants, W. C. King himself signing with the other defendants. The language of the amicable scire facias itself is, "with full costs of suit, release of all errors, etc., and to have the same effect as if a writ of scire facias had been regularly issued, served on us, and judgment obtained thereon according to law."

What is the effect of this amicable scire facias? In *Buehler v. Buffington*, 43 Pa. 293, Justice LOWRIE uses the following language: "Nor can we regard the judgment as invalid, though it was on a scire facias post annum et diem, on a previous judgment that was void. If we could find no previous record at all, the new judgment would not be void on that account, though it might be reversible for irregularity in its own process, but having no valid judgment to rest on, it must be treated as a new judgment." In *Ramsey v. Linn*, 2 R. 228, Justice TODD says: "A confession of judgment in every amicable action admits the issuing of a writ, though, in fact, no such writ ever issued." Therefore, a judgment regularly revived by amicable scire facias, is not void, though the original judgment itself is void.

Your auditor is therefore of opinion that judgment No. 62 April Term 1883, in favor of Susquehanna Building Association, was a good and valid lien at time of sale of the real estate by the assignee, and that any defects it may have had to pre-

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vent it from participating first in a distribution prior to the revival, were all cured by the revival.

The auditor further reported that at the date of the first revival of the judgment to the use of the building association, W. C. King had title to the undivided one third only of the real estate in question, upon which one third interest said revived judgment was the first lien; that title to the remaining two thirds of said real estate was acquired by him eighteen days after said revival, and that prior to the second revival of said judgment the judgment of Sponsler was entered, and thus became the first lien on said undivided two thirds interest. The one third of the fund arising from the real estate was accordingly appropriated by the auditor to the judgment of the building association, and the other two thirds to that of W. A. Sponsler.

To the foregoing report of the auditor, W. A. Sponsler filed exceptions alleging that the auditor erred in finding that the building association's judgment was a valid lien upon the individual estate of W. C. King, and allowing it to participate in the distribution of the one third of the fund to the exclusion of exceptant's judgment.

These exceptions, upon argument, were overruled by the court, BARNETT, P. J., and a decree made confirming the report of the auditor and directing distribution accordingly. Thereupon the exceptant took this appeal, assigning for error the refusal of the court to sustain his exceptions and appropriate the fund in controversy to his judgment, No. 59 October Term 1885.

Mr. Charles H. Bergner (with him *Mr. W. H. Sponsler*), for the appellant:

1. The debt for which the widow and all the heirs of Robert S. King confessed judgment to W. C. King on April 1, 1873, was contracted by the father with the son prior to the father's death. Wm. C. King undoubtedly became one of the defendants because he believed it necessary to have the judgment entered against all the heirs. It is absurd to suppose that he intended to incumber his separate real estate, acquired by his own labor, to secure payment of a debt due him from

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his deceased father. His appearing as a nominal defendant is of no concern, for the reason that on the entry of the judgment for the purpose of lien against the real estate of which he was part owner in fee, his liability as defendant immediately merged in his fee, and the lien of the judgment became, as against him and his property, extinct in law: *Koons v. Hartman*, 7 W. 25; *Moore v. Harrisburg Bank*, 8 W. 148; *Richards v. Ayres*, 1 W. & S. 487. The rule is clear that there must be an intention, at the time the incumbrance is placed, that it shall not merge; that when this intention is not shown, it will be presumed, if advantage is likely to accrue from maintaining, or disadvantage to follow from discharging the incumbrance; but, if it is indifferent to the party whether the incumbrance remains or not, it invariably merges in the fee and becomes extinct beyond the possibility of resuscitation: *Pennington v. Coats*, 6 Wh. 283; *Richards v. Ayres*, 1 W. & S. 487. There is no evidence of any intention of W. C. King to incumber his own individual real estate, and no room for a presumption, under the rule of law, of such intention.

2. The lien of the judgment being extinct as to W. C. King, the assignment to the building association could not revive it: *Koons v. Hartman*, 7 W. 25. An assignee of a chose in action takes subject to equities affecting the original holder: *Hendrickson's App.*, 24 Pa. 365. A fortiori, on the assignment of a judgment the lien of which is extinct in whole or in part, it remains extinct to the same extent after the assignment as before. Nor should the fact that W. C. King joined with the other defendants in signing the amicable scire facias to No. 532 January Term 1878, alter this case. The judgment was what might be termed a class judgment, entered against the heirs of Robert S. King to secure a lien on the decedent's real estate, and the revival changed its status not a whit. W. C. King was still the legal plaintiff and it was still merged in his fee, giving no lien on his real estate. The marking of the revival to the use of the association gave it only such rights as the legal plaintiff had had. The authorities cited by the auditor are not applicable, as they all refer to cases where the plaintiff and defendant in the judgment were two different persons. If the association had revived the judgment in its own name, leaving out the name of W. C. King as legal plaintiff, as it

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had the right to do under Reed's App., 7 Pa. 66, a different case might have been presented. But this revival, like the original judgment, created no lien on the property of the legal plaintiff.

Mr. Charles H. Smiley, for the appellee:

The auditor had no authority under his appointment to inquire into the validity of the judgment: Benson's App., 48 Pa. 161; Second N. Bank's App., 85 Pa. 530; Thompson's App., 57 Pa. 177; Edwards's App., 66 Pa. 90. Further: Even if not bound by the original judgment, W. C. King was concluded by the amicable revival, and a valid lien was thereby created: Cash v. Tozer, 1 W. & S. 525; Hays v. Shannon, 5 W. 549; Shaeffer v. Child, 7 W. 86; Stewart v. Peterson, 63 Pa. 232; Duff v. Winkopp, 74 Pa. 305; Ramsey v. Linn, 2 R. 228; Buehler v. Buffington, 43 Pa. 293; Harper v. Biles, 115 Pa. 594; Campbell's App., 118 Pa. 136. Moreover, the revival was in proper form, and the court will look beyond the nominal party and treat as the real party him whose interests are involved in the issue: Roberts v. Halstead, 9 Pa. 32; Reed's App., 7 Pa. 65; Peterson v. Lothrop, 34 Pa. 223. The judgment was valid against W. C. King and no one else can complain: Edwards's App., 66 Pa. 90.

PER CURIAM:

This was an appeal from the decree of the court below distributing the assigned estate of W. C. King. The fund is the proceeds of the sale of real estate and the contest is between lien creditors. The only error assigned is that the court did not award the fund to the judgment of the appellant, No. 59 October Term 1885. The court could not have done so without disregarding the prior judgment, No. 62 April Term 1883, now held by the Susquehanna Building Association. This the auditor appointed by the court to make distribution could not do.

The last named judgment was in full force and unsatisfied. The only ground upon which it was assailed was that W. C. King, the plaintiff in the judgment, was also one of the defendants therein, and it was alleged that he could not occupy both positions. King had assigned this judgment to the building association above named, after which it had been revived in favor of said association. The judgment No. 62 April Term

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1883, was entered upon the scire facias. It cannot be successfully contended that this revived judgment in the hands of the building association was not good against King. It was not a fraud upon him, and if it were, his creditors cannot attack it for that reason, although he might do so upon a proper application to the court in which it was entered. Creditors can only attack a judgment before an auditor, when such judgment has been fraudulently given by collusion for the purpose of hindering and delaying them. The authorities upon this point are numerous; it is sufficient to refer to Second National Bank's App., 85 Pa. 528, where the subject is discussed and a number of the cases cited.

The decree is affirmed and the appeal dismissed at the costs of the appellant.

A. W. STEVENS ET AL. v. OLIVER DIEHL ET AL.

ERROR TO THE COURT OF COMMON PLEAS OF NORTHUMBERLAND COUNTY.

Argued May 27, 1889—Decided June 28, 1889.

- (a) At a sheriff's sale on a writ from a judgment confessed on an individual note given by one of two partners for money borrowed and used for the benefit of the firm, certain property was purchased by the judgment creditor.
- (b) Learning afterwards that the property was partnership property, and fearing his title thereto was imperfect, the purchaser obtained from the partners a firm note, on which a judgment was confessed, execution issued, sale had, and the same property again purchased by him.
- 1. In equity, as between the parties, the first execution sale was inoperative as a satisfaction of the indebtedness; in the second execution sale upon a judgment which was for the same debt, executed and accepted in entire good faith, there was no fraud upon other creditors and the purchaser's title was thus perfected.

Before PAXSON, C. J., STERRETT, GREEN, CLARK and WILLIAMS, JJ.

No. 189 January Term 1889, Sup. Ct.; court below, No. 364 September Term 1888, C. P.

Statement of Facts.

On August 28, 1888, a feigned issue in which Oliver Diehl and John F. Enterline were plaintiffs, and A. W. Stevens & Son were defendants, was entered, to try the title to certain personalty levied upon as the property of Benjamin Reichenbach and John A. Reichenbach, trading as Ben. Reichenbach & Son, but which was claimed by the plaintiffs.

On October 16, 1886, Reichenbach & Son bought of Stevens & Son a steam thrashing machine, traction engine and water tank for \$1,650, giving in payment therefor, three judgment notes dated October 4, 1886, for \$550 each, payable January 1, 1887, 1888 and 1889, respectively. Judgments were at once entered upon these notes in the order of maturity, to Nos. 89, 90 and 91 December Term 1886.

On April 29, 1887, but \$100 having been paid on the note due January 1, 1887, Benjamin Reichenbach borrowed \$200 from William H. Leighou and paid it to Stevens & Son. As security, Benjamin Reichenbach gave to Leighou his own judgment note with one Probst as surety, for \$204. On April 30, 1887, judgment was entered on this note, and on the same day a fieri facias to No. 1 September Term 1887 was issued thereon and placed in the sheriff's hands. Subsequently, Benjamin Reichenbach borrowed \$269.70 more from Leighou and therewith paid to Stevens & Son the balance on their first note due April 1, 1887. To secure this second loan, Benjamin Reichenbach gave another judgment note to Leighou, with the same surety, and the same day, May 2, 1887, judgment was entered thereon, a fieri facias issued to No. 4 September Term 1887, and placed in the sheriff's hands. Under these two writs the sheriff made and returned a levy upon numerous articles of personalty, including the thrashing machine, traction engine and water tank, as the property of Ben. Reichenbach. At the sale of the property thus levied upon, on May 23, 1887, W. H. Leighou became the purchaser of the thrasher, engine and tank.

Afterwards, Leighou, discovering that the thrasher, engine and tank belonged to the firm of Reichenbach & Son, instead of to Benjamin Reichenbach, thereupon induced Benjamin and John A. Reichenbach to give him their joint judgment note for \$624.50, dated November 17, 1887, upon which he at once entered judgment and issued a special fieri facias to No. 8 February Term 1888, under the act of April 8, 1873, P. L. 65,

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regulating executions against firm property for individual indebtedness. A levy was made upon this writ on the thrashing machine, traction engine and water tank, followed by a sale of the same a second time to Leighou.

About February 11, 1888, Leighou sold the thrashing machine, engine and water tank to Oliver Diehl and John F. Enterline, the plaintiffs, in this issue. Subsequently, Stevens & Son issued execution on their judgments and directed the sheriff to make a levy on the thrashing machine, engine and tank, in the hands of Diehl and Enterline. They contended on the trial of the issue that the note of November 17, 1887, for \$624.50 was void for want of consideration; that Leighou, who was a party to the transaction, had no title through the first sale and acquired none by the second, and having no title could pass none to Diehl and Enterline; that the intention was to defraud Stevens & Son, who had a legal right to a levy and sale of the property they had sold, and for which they had not been paid.

The court, ROCKEFELLER, P. J., refused to affirm the points submitted by the defendants, Stevens & Son, in support of their contention, and in giving the case to the jury charged, *inter alia*, as follows:

We say to you if you find that the consideration for the two judgments of \$204 and \$269.70, was money advanced by Mr. Leighou to Benjamin Reichenbach, one of the members of the firm of Ben. Reichenbach & Son, for firm purposes, that is, to pay off a firm debt, and it was afterwards discovered that the sale upon those two judgments was void and passed no title to the plaintiff, William H. Leighou, and that in consideration of that matter Benjamin Reichenbach and John A. Reichenbach, the two members of the firm, which firm had received the benefit of Leighou's money, agreed then to give Leighou another judgment for the amount that he had advanced with interest and costs, I can see no reason why such judgment would not be a good and valid judgment. The first two judgments were satisfied, of course, by the sheriff's sale, whether Leighou got a good title to the property that he purchased or not. But I cannot see any reason why, if he got no title, common honesty and morality would prevent the two Reichenbachs from afterwards

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giving another judgment to Leighou, so as to enable him to make himself whole for the money that he had advanced for the benefit of the firm. And, if you find these were the facts, we say to you that the consideration of judgment No. 37 February Term 1888, for \$624.50 was sufficient. Then if you find from the evidence that that was a fair and honest judgment, that there was no fraud in its execution and the giving of the judgment by the two Reichenbachs to Leighou, then the sale made under the fieri facias issued upon it to No. 8 February Term 1888, passed a good title to Leighou for the property that was sold to him by the sheriff.

The jury returned a verdict for the plaintiffs, and a rule for a new trial having been discharged, judgment was entered on the verdict. The defendants thereupon took this writ, assigning for error, inter alia, the refusal of their points, and the part of the general charge above quoted.

Mr. S. B. Boyer (with him *Mr. J. H. Vincent*), for the plaintiffs in error.

Mr. C. R. Savidge (with him *Mr. Geo. B. Reimensnyder*), for the defendants in error.

PER CURIAM:

It may be, as between the parties, the sale on the two executions, Nos. 1 and 4 to September Term 1887, at the suit of William H. Leighou v. Benjamin Reichenbach and Jacob Probst, operated as a satisfaction of the judgments on which the executions were issued. This was so at law, but not necessarily so in equity. It was believed by both the parties to the transaction, that the sheriff's sale was an abortive proceeding, and that the plaintiff who bought the property took no title. He had not received any actual satisfaction for his debt. To remedy this difficulty, the defendants in the judgment confessed the \$624.50 judgment, which was for the same debt, and under it an execution was issued, and the same property again levied upon and sold to the plaintiff. His title was thus perfected. We see nothing objectionable in this. There was no fraud upon other creditors. It appears to have been done in entire good faith and for the sole purpose of perfecting a title sup-

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posed to be bad. We find nothing in the rulings of the court to criticise, and a further discussion of the case is unnecessary.

Judgment affirmed.

APPEAL OF H. M. PRIESTLEY, ADMRX.
APPEAL OF EPHRAIM CUTTER, ADMR.

[ESTATE OF HUGH BELLAS, DECEASED.]

FROM THE DECREE OF THE ORPHANS' COURT OF NORTHUMBERLAND COUNTY.

Argued May 28, 1889—Decided June 28, 1889.

[To be reported.]

1. Notwithstanding the language ("shall grant") of § 1, act of October 13, 1840, P. L. (1841) 1, an account settled and confirmed by the Orphans' Court can be reviewed only for error of law apparent on the face of the record, or for new matter which has arisen since the decree: Simpson's App., 18 W. N. 175, distinguished.
2. The bill of review must be founded upon some error apparent upon the bill or petition, answer and other pleadings, and decree, which together constitute the record; and the evidence cannot be looked into to support an objection based upon the supposed error of the court in its deductions therefrom.
3. But, as a matter of grace, a review may be granted for new proof discovered after the decree, which proof could not possibly be used at the time when the decree was made; yet, where the party complaining has been guilty of laches after notice of the decree, the bill should not be granted.
4. The notice by advertisement, directed by law, that an account has been filed and will be presented to the Orphans' Court for confirmation, is effective upon any person or persons entitled to come in and object to the decree.
5. And where the petition for a bill of review of an account confirmed, alleges no error of law apparent on the face of the record, but error merely in the amount of commissions allowed to accountant, determinable on the facts, and there is no allegation of after-discovered testimony, the petition should be refused.

Before PAXSON, C. J., STERRETT, GREEN, CLARK and MITCHELL, JJ.

Nos. 242, 371 January Term 1889, Sup. Ct.; court below, No. 48 February Term 1887, O. C.

Statement of Facts.

On April 11, 1887, the petition of Ann C. Rodrigue was presented, setting forth, in substance :

That Hugh Bellas, late of the borough of Sunbury, died having made his last will duly admitted to probate, in a codicil to which, dated November 3, 1860, he devised to trustees a certain portion of his property in trust for Ann C. Rodrigue, providing: "And the said trustees or either of them are required to apply all the proceeds and profits thereof to her personal use and support and benefit from time to time as she may need and require, when deemed necessary for herself and children, but not to be applied or used otherwise.*"

That, the trustees named in the codicil declining to act, Dr. Joseph Priestley was appointed by the court on August 17, 1865, as substituted trustee; and, the executors named in the will also declining to act, letters of administration c. t. a. were issued to Mr. S. P. Wolverton, who "attended to all the duties of the appointment in your petitioner's interest in said estate, and no labor or responsibility was required on the part of said trustee, except the mere form of transmitting to her checks which were drawn monthly by the said administrator and sent to him."

That on December 11, 1882, the said Dr. Priestley had presented a petition to the Orphans' Court upon which he was discharged from the trust, "which he had not acted in for ten years," and she had lately been informed that on September 6, 1882, Dr. Priestley had filed an account, in which he had charged himself with having received various sums of money, taken from the distribution accounts attached to the annual accounts of S. P. Wolverton, administrator c. t. a. of Hugh Bellas, deceased, amounting to \$76,777.95, and had taken credit with having paid the same out on the same date to her, and charged thereon a commission of \$1,560.40.

"Your petitioner avers that not one dollar went into the hands of the said Joseph Priestley, as her trustee; that it was transferred bodily from the accounts of S. P. Wolverton, administrator with the will annexed, and that all the items embraced in said account were paid directly to her by S. P.

* In Rodrigue's App., 22 W. N. 358, it was decided that, Mrs. Rodrigue being a widow and not in contemplation of marriage, the trust created by this codicil was passive and the cestui que trust was entitled to a conveyance of the property.

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Wolverton, administrator, under an agreement in writing, signed by herself and all her children, providing for the direct payment to her, instead of through the trustee. She further avers that she is a non-resident of the state, and is now residing at Woodbridge, in the state of New Jersey; that she had no notice of the filing of said account in writing, and only recently learned of the existence of said account, and the fact that a rule had been obtained upon her to pay the said sum of \$1,560.40. That the said account is incorrect, in the fact that it states upon its face that \$76,777.95 was received by Joseph Priestley, from S. P. Wolverton, administrator of Hugh Bellas, deceased, when in truth none of said money went into his hands, and it is incorrect in stating that he paid out these amounts at various dates therein stated to Ann C. Rodrigue; that the money was all paid directly by S. P. Wolverton, administrator, to her, and did not go through the hands of the said alleged trustee."

Further averring that it was incorrect to charge "her for services which were never performed, a commission of \$1,560.40," the petitioner brought this her bill or petition for review, and prayed to be relieved thereon, and that a citation should issue upon Hannah H. Priestley, administratrix of Dr. Joseph Priestley, then deceased, and all parties interested, commanding them, etc.

The answer of Hannah H. Priestley, administratrix of Dr. Priestley, filed to the foregoing petition, set out, *inter alia*, the duties performed by the trustee, of which the petitioner had knowledge; that his account was prepared in the office and with the knowledge of the administrator *c. t. a.* of the estate, and from the receipts and vouchers of the trustee which he had permitted to remain in the hands of said administrator; that the filing of said account with the register was advertised in due form of law, and, no exceptions being filed thereto, was confirmed absolutely on December 6, 1882; that the respondent had no knowledge of the existence of an agreement in writing, signed by the petitioner and her children, providing for the direct payment to the petitioner, instead of through the trustee, as alleged.

"Your respondent, further averring that the said account is correct in every particular and most carefully and conscientiously stated by the accountant; that there are no specific

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errors alleged in said petition, nor any errors apparent on the face of the record; that the only error alleged, other than that of filing an account at all, is the striking of a balance which shows that there was due the accountant at the time of the filing thereof the sum of \$1,560.40, which sum represents and includes commissions for acting as trustee for ten years and upwards, the payment of counsel fees, the register for passing the account, and the responsibility for the proper appropriation of \$76,777.95; that the said account was filed with the actual and legal knowledge of said petitioner; that no exceptions were taken thereto by her, or by any one in her behalf, and that upwards of four years have elapsed since the absolute confirmation thereof, prays the said court that she may be dismissed," etc.

The foregoing answer having been filed, on June 29, 1887, the court appointed *Mr. J. Nevin Hill*, auditor, to hear the testimony and to report the facts in the case, and his opinion thereon.

The auditor found as facts, in substance, that from the time of his appointment, in August, 1865, up to July, 1872, Dr. Priestley acted uninterruptedly as trustee under the will of Mr. Bellas and the appointment of the court, receiving from the administrator c. t. a. moneys due Mrs. Rodrigue and paying the same over to her; that in 1872, there were disagreements between Mrs. Rodrigue and Dr. Priestley relative to his charges for compensation and partly the result of his refusal to pay her the proceeds of the sale of some real estate, to which he was advised she was not entitled; that, upon these disagreements, Dr. Priestley filed what was denominated a final account and made application to the court to be discharged, but his petition was held under advisement until a satisfactory trustee could be agreed upon and would consent to take his place; that from this time on the administrator of the estate paid the moneys due Mrs. Rodrigue directly to her, taking receipts, however, to Dr. Priestley as trustee; that "for some reason unexplained, probably because Mrs. Rodrigue regarded it as unnecessary and a useless expense," no trustee to relieve Dr. Priestley was appointed or even applied for; that in the account stated in 1882, the items were taken from the annual accounts filed by the administrator; that "on the debtor side, he charged the ac-

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countant with 'cash received from S. P. Wolverton, administrator of Hugh Bellas' numerous items aggregating \$76,777.95. On the credit side, he gave credit for a balance due from the former account, filed April, 1872, \$28.16, and numerous items of 'cash paid Mrs. Ann C. Rodrigue' aggregating, with one item of 'commissions due accountant,' of \$1,522.24, and another of \$10.00 paid the register for passing account, the sum of \$78,338.35 showing a balance due the accountant of \$1,560.40;" that by a paper dated April 9, 1878, signed by Mrs. Rodrigue and all her children, acknowledged and recorded, Mr. Wolverton, the administrator c. t. a., was authorized to pay directly and monthly to Mrs. Rodrigue the one third of the income, her share under the will, without the delay and expense of the payment of the same through a trustee; that it was not shown that Mrs. Rodrigue had actual knowledge of the filing of the account of 1882, but she had constructive notice thereof by the advertisement of it by the register; that Dr. Priestley died on March 10, 1883, and on March 23, 1883, letters of administration upon his estate were granted to Hannah H. Priestley, his widow.

The auditor, upon the facts found by him, but briefly abstracted above, reported the following opinion:

The application for a review of the account of Dr. Joseph Priestley, trustee of Ann C. Rodrigue, is made under the provisions of the first section of the act of October 13, 1840, P. L. (1841) 1.

This act does not specifically mention accounts of testamentary trustees, but was evidently intended to include all accounts over which the Orphans' Court has jurisdiction. The act is remedial and should be liberally construed, and I believe it is broad enough to cover the present case.

The petition in this case was presented within five years after final decree confirming the trustee's account; it was presented by a person interested, and sets out that the account is erroneous in that none of the sums of money with which the accountant stands charged were in fact received by him; that none of the sums claimed to have been paid the petitioner were in fact paid her by the accountant, and that the accountant did not perform any services which would entitle him to the com-

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missions claimed, viz.: \$1,522.24; that in fact he did not act as trustee of the petitioner during the time covered by the account, but had declined to do so. This petition and specification of errors, is verified by affidavit.

If these allegations of error, going into the whole of the account, are sustained by the facts in the case, is not the petitioner within the act and entitled to a rehearing; and is not the court bound to grant a rehearing of the account and to give such relief as justice and equity may require? It seems to me this is all there is in the case for the present. The auditor may think that the charge of \$1,522.24 is not excessive, and if the accountant actually handled the money he charged himself with, it would be a very modest charge; and it may be a moderate charge for responsibility merely, considered by itself; but this question can arise only on a review.

Of one thing there can be no doubt. Dr. Priestley continued to be the legal trustee under the will of Hugh Bellas of Mrs. Rodrigue, by appointment of a court of competent jurisdiction, and he was not discharged as such until 1882. During the time from 1872, when he filed what he designated as his final account and applied to the court to be discharged, up to 1882, when he was discharged on the second petition after filing the account in controversy, he had a right to demand and receive the one third of the income or interest of the estate of Hugh Bellas due Mrs. Rodrigue, and he was accountable for the same. But he did not do so. He became incensed at the allegations of Mrs. Rodrigue that no trustee was necessary, and that his commissions were too high and a useless diminution of her income. Acting upon what he deemed sufficient provocation, he declined to receive further remittances on account of Mrs. Rodrigue from the administrator of the estate. True, he did not press his petition for discharge and allowed it to be lost sight of; but after returning the administrator's check in 1872, with the declaration that he would have nothing further to do with Mrs. Rodrigue's affairs, he cannot be said to have acted in any sense as her trustee. Certain things he did relative to the business, but these were only for his own protection and not necessarily for the protection of the trust estate or the benefit of the cestui que trust. In fact, he did what he determined to do in the first place, and never changed his mind. He refused to have anything to do with Mrs. Rodrigue or her affairs.

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All this has nothing to do with his responsibility as trustee, but it seems to me to be important in considering the right to charge himself with funds which by his own declination never came into his hands; to claim credit with payments which he never made, and to claim compensation as though he had managed the affairs of the estate. The account is in that form. It is fictitious and erroneous on its face. It is true that the receipts taken by Mr. Wolverton, the administrator, were taken as though the money had been paid by Dr. Priestley, through the administrator. But this was as fictitious as the account itself, and it is in evidence that Mrs. Rodrigue objected to dealing with the administrator in that way, and declined to sign many of the receipts. It does not appear that Dr. Priestley either authorized or directed Mr. Wolverton to pay Mrs. Rodrigue. He simply refused to receive and handle Mrs. Rodrigue's money. Mr. Wolverton requested Dr. Priestley to withhold his application for discharge until another trustee could be appointed, and took receipts in Dr. Priestley's name simply because he thought the will required the intervention of a trustee. After Dr. Priestley's refusal to act, the trusteeship itself became a fiction except as to the responsibility of the trustee, and this the trustee had a right and it was undoubtedly his duty to guard, by demanding the money due the cestui que trust and to receive and pay it out.

The auditor is of opinion that the account is erroneous; that the allegations of the petitioner have been sustained by uncontradicted evidence and that a review should be granted as a matter of right.

Counsel for the respondent contends that the petitioner is not entitled to a bill of review in law because she has not averred errors of law appearing on the face of the decree, or new matter that has arisen since the decree of confirmation, or that new evidence has been discovered, and cites Hartman's App., 36 Pa. 70, Milligan's App., 82 Pa. 395, and Scott's App., 112 Pa. 427. I cannot say the petitioner has not averred errors of law on the face of the account. It is necessary to aver errors on the face of the record or in the account merely, and I am of opinion that it is sufficient to aver that the accountant in fact never received the moneys with which he charged himself, and upon which he bases claims for commissions, the balance being against the cestui que trust.

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It is also contended that the allegation of want of notice of the filing of the account has no evidence to support it, that it is denied by the answer and contradicted by the evidence before the auditor; and that, had there been no actual notice, the advertising of the account by the register is as effective and binding as actual notice; citing *App v. Dreisbach*, 2 R. 287. It has been found as a fact that actual notice has not been shown or denied, but that there was constructive notice, which in law is as binding, for all practical purposes. The act of 1840, however, does not by its terms require it to be shown that there was no notice, to entitle an interested party to a review. In the case of *Simpson's App.*, 18 W. N. 175, which arose in this court, constructive and actual notice were shown, and the petitioner lived within a few yards of the register's office, yet the court allowed a review and the Supreme Court affirmed the decree. Where no intervening rights are affected, and where no equities have arisen to the contrary, I believe the matter of notice to be immaterial.

Counsel also contends that Dr. Priestley could not abandon the trust, and that if he did abandon it, as alleged, it did not relieve him from the responsibility of the proper appropriation of the funds by the administrator; citing *Perry on Trusts*, §§ 266-268; *Webster v. Vandeventer*, 6 Gray 428; 11 Paige, 319. This is undoubtedly the law. If Mr. Wolverton had squandered the money, the trustee would have been liable for it; and, moreover, he could have made no claim for commissions, and could not have charged himself with the funds as a basis of a charge against the cestui que trust. He may have estopped himself from charging anything, and I understand that the petitioner claims that he did so.

It is further contended that it was arranged between the administrator and the trustee that from 1872 the money should be paid direct to Mrs. Rodrigue by the administrator and receipts taken in the name and for the trustee by him. I have not been able to find this. There is no evidence before me that goes to show that there was such an agreement. On the other hand, the trustee appears as insisting upon his discharge and merely delaying the matter for a term when it seems to have been overlooked.

Again; it is contended that the trustee considered himself

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as acting after April, 1872, and down to his final discharge, and responsible for the acts of Mr. Wolverton who was merely his agent. If Mr. Wolverton acted as the agent of Dr. Priestley after 1872, I would take a different view of the case, but I do not think the evidence warrants that conclusion. Dr. Priestley continued to be the technical trustee after that time, but he did not act.

I think I have now considered and disposed of the questions involved in the case at this stage. I must say, however, that I have been largely influenced by the position of the court and the Supreme Court in Simpson's Appeal, to which I have referred. It seems to me the circumstances of the two cases are quite similar. The allegation there was, that the accountant had charged himself with moneys which had never come into his hands, the petition being presented by the surety in the guardian bond. This was held to be an error on the face of the account. It was also shown in that case that the surety had notice of the filing of the account, and by examining it he would have discovered that his principal was charged with a large balance for which he, the surety, would be liable. He allowed the account to be confirmed; and yet the court struck off the decree of confirmation and allowed a rehearing, when it was shown that in fact the guardian had never received the larger part of the moneys with which he was charged. In this case, it is the beneficiary who is charged with a balance and makes the application for a rehearing. She alleges that the moneys charged on the debtor side of the account, upon which the balance against her is predicated, never came into the hands of the accountant, and that he never performed any of the services indicated by the account. I cannot distinguish the two cases, and am therefore constrained to say that in my opinion the decree of confirmation of the account of Dr. Joseph Priestley, trustee of Ann C. Rodrigue, filed July 15, 1882, should be stricken off and a rehearing of the whole of said account granted.

Various exceptions filed to his report by the respondent were overruled by the auditor. Said exceptions being filed with the report and renewed, the court, ROCKEFELLER, P. J., filed an opinion, which after reviewing the facts concluded:

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It is strenuously contended that the confirmation cannot be opened and that the petition ought to be dismissed :

First, because there is no error of law apparent on the face of the decree. If this is so, the objection is a good one, and I admit that I am not entirely clear in regard to it. The facts, however, are, that Dr. Priestley did not in any sense act as trustee for Mrs. Rodrigue, after April 9, 1878. He having refused to act, although not discharged by the court, a written agreement was put on record, signed and executed by the cestui que trust, who was sui juris, and her family, that all moneys were to be paid directly to her. After that date all moneys were paid directly to her and not to the trustee, nor was any paid by him to her. The account, however, on the face of it, shows that commissions were charged on all sums paid after that date. It is claimed that this is not error apparent on the face of the decree. I think it is as much so as was the case in Simpson's Appeal, decided in this court and affirmed by the Supreme Court, and I am sure there are many other cases in the books where the courts have looked beyond the record in the case, especially [into] other records for the facts, in order to ascertain whether there was error apparent on the face of the record.

Second, it is claimed that there is no new matter arising subsequent to the decree, and, third, no after-discovered evidence. Dr. Priestley had not actively acted as trustee since filing what he styled his final account in 1872, and Mrs. Rodrigue doubtless never expected another account to be filed. She lived in another state and did not discover that an account had been filed until 1887, when she was called upon to pay the balance in favor of Dr. Priestley, as it appeared in the account. This balance arose from the charge of the trustee for commissions. Of course, the presumption is that the legal notices were given of the filing of the account, and therefore Mrs. Rodrigue had constructive notice and this perhaps was all that was necessary. She was not entitled to actual notice. She has not produced what is considered strictly after-discovered evidence, that is, evidence discovered since the decree, which could not by diligence have been discovered and produced at the time. But the fact that she had no actual notice of the filing of an account which she had reason to believe was not

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necessary and never would be filed, will cause a court to consider carefully all other matters that may by law afford relief.

I am of opinion that Dr. Priestley ought to be allowed commissions or compensation for responsibility on account of the trust fund received and paid out from May, 1872, to April, 1878, inclusive, and that what is said in the per curiam opinion of the Supreme Court in *Stevenson's Est.*, 4 Wh. 103, is sound, except that in this case under the circumstances, perhaps two per centum is sufficient. I am further of opinion that from and after April 9, 1878, no commissions ought to be allowed.

* * * * *

The decree confirming the account is opened and a rehearing or review of the whole account granted as prayed for.

The account was then referred by the court to Mr. Hill, the auditor, for re-statement. On the hearing, testimony was submitted showing facts which induced the auditor to report alternative statements of the account, one of which, A, allowed the accountant credit for commissions for services, responsibility, trouble and expenses, including attorney fees due to his legal advisers, \$1,522.24; the other, B, allowing credit to the accountant, separately, for the same attorney fees, and commissions at 2 per cent on the amount of the money received from the administrator c. t. a. and paid over by him directly to Mrs. Rodrigue from May 1, 1872, to April 9, 1878.

Upon exceptions filed to this report by both the petitioner and the respondent, the court adopted statement B, reported by the auditor, striking out, however, one attorney fee and increasing the commissions to 3 per cent, making them amount to \$980.34. Thus modified, the statement B was confirmed and a decree entered accordingly.

Pending the proceedings before the auditor, Mrs. Ann C. Rodrigue died, and letters of administration upon her estate were granted to Ephraim Cutter, and upon the entry of a final decree by the court, Mr. Cutter, administrator, took the appeal to No. 242, specifying that the court erred in overruling the several exceptions filed by the petitioner, and in allowing any commissions whatever to the accountant.

Mrs. Hannah H. Priestley, administratrix, took the appeal to No. 371, specifying that the court erred in overruling the

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several exceptions filed by the respondent, and in opening and reviewing the account, and reducing the commissions allowed to the accountant.

Mr. S. P. Wolverton (with him *Mr. L. H. Kase*), for Ephraim Cutter, administrator, appellant.

Mr. Harold M. McClure, for Mrs. Hannah H. Priestley, appellant.

No. 371.

OPINION, MR. CHIEF JUSTICE PAXSON :

The account of Dr. Joseph Priestley, which is the cause of the present contention, was confirmed absolutely December 6, 1882, and on the 11th day of the same month he was discharged as trustee by the court on his own petition. He died on March 10, 1883, and letters of administration were granted to Hannah H. Priestley, the appellant, on March 28, 1883. More than four years after Dr. Priestley's death, Mrs. Rodrigue, the appellee, presented the petition in this case for a review of his account as trustee. The whole contention was about a matter of commissions, the trustee having charged \$1,522.24, being two per cent upon the money passing through his hands for a number of years. It was alleged that for a number of those years Dr. Priestley did not actually receive and disburse the money, owing to differences between himself and Mrs. Rodrigue, which it is not necessary to refer to in detail ; that during this time he refused to act as trustee, or to have any business intercourse with his cestui que trust, and the money was paid by S. P. Wolverton, Esq., the administrator, directly to Mrs. Rodrigue. The receipts therefor were taken in the name of Dr. Priestley as trustee. The court referred the petition to an auditor, who took a large amount of testimony, resulting in the granting of the review, a subsequent re-statement of the account, with a decree of the court below reducing the commissions to \$930.84. The principal question raised upon this appeal was the propriety of granting a review. This underlies the entire case.

After a man has been dead for four years, and more than four years after the confirmation of his account as trustee, the reasons should be weighty to induce a court to grant a review and open the account to further litigation. Especially should

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the delay be clearly and satisfactorily accounted for. In such case there should be no laches: Scott's App., 112 Pa. 427. In her petition the appellee alleges that "she resides in New Jersey, had no notice of the filing of the account, and only recently learned of its existence." This averment is evasive. It should have stated when she learned of it. The appellant in her answer distinctly avers that the account "was filed with the actual and legal knowledge of the petitioner." It was conceded she had legal notice; there was no evidence as to actual notice before the auditor, and this point must be disposed of upon the pleadings. As no evidence was offered to contradict the answer, it must stand as conclusive. This is the rule in equity, where, as here, the answer is responsive: Eaton's App., 66 Pa. 483; Rowley's App., 115 Pa. 150. Aside from this, legal notice was sufficient. "The notice directed by law must be good and effectual, and we ought not to hear any complaints on that subject:" App v. Dreisbach, 2 R. 287.

It was urged, however, that a review is a matter of right under the act of October 13, 1840, P. L. [1841] 1, if applied for within five years, and that in such cases no question of notice or laches arises. If we concede the truth of this position it does not affect the case. I have not referred to those matters for the purpose of showing that they would bar the right to a review within five years. It is not necessary in this case to decide such a point or discuss it at length: where, however, there has been laches, and the party complaining had both legal and actual notice of the filing of the account, it would be a persuasive reason why a court, exercising equity powers, should move slowly, and see that the case clearly comes within the act of 1840, and refuse it altogether where the application is *ex gratia*.

It has been ruled, in a line of cases, that an account settled and confirmed can only be reviewed for error of law apparent on the face of the record, or for new matter which has arisen since the decree. As a matter of grace, a review may be granted for new proof, discovered after the decree, which proof could not possibly have been used at the time when the decree was made: Story's Equity, § 104; Riddle's Est., 19 Pa. 431; Russell's App., 34 Pa. 258; Hartman's App., 36 Pa. 70; Milligan's App., 82 Pa. 389; Scott's App., 112 Pa. 427. This

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court early adopted these principles of equity as applicable to the act of 1840, and they have never been departed from in a single instance to my knowledge. It was said by Mr. Justice STRONG, in delivering the opinion of the court in *Hartman's Appeal*, *supra*: "The construction given by the court below to the act of October 13, 1840, was entirely accordant with that which the court has given in numerous cases. It was first announced in *Riddle's Est.*, 19 Pa. 433, repeated in *Bishop's App.*, 26 Pa. 470. It was also recognized in *Stevenson's App.*, 32 Pa. 318, and in *Russell's App.*, 34 Pa. 258. The construction is now too firmly settled to be disturbed by us." And the authorities I have cited show that the same construction has been maintained to the present time. The rule in equity is, that a bill of review will not lie for an error of law, unless such error appears on the face of the decree. Mr. Justice STORY, in commenting upon this rule in *Whiting v. Bank of the United States*, 13 Pet. 13, said: "That is true, in the sense in which the language is used in the English practice. In England the decree always recites the substance of the bill and answer, and pleadings, and also the facts on which the court founds its decree. But in America the decree does not ordinarily recite either the bill, answer, or pleadings, and generally not the facts on which the decree is founded. But with us the bill, answer, and other pleadings, together with the decree, constitute what is properly considered the record; and, therefore, in truth the rule in each country is precisely the same in legal effect, although expressed in different language, viz., that the bill of review must be founded on some error apparent upon the bill, answer, and other pleadings, and decree; and that you are not at liberty to go into the evidence at large in order to establish an objection to the decree, founded on the supposed mistake of the court, in its own deduction from the evidence." And in *Putnam v. Day*, 22 Wall. 60, it was said by Mr. Justice BRADLEY: "We think the rule to be well established, and a wholesome one, that the proofs cannot be looked into on a bill of review. This was expressly held in *Whiting v. Bank*, 13 Pet. 6.

It follows, from what has been said, that when Mrs. Rodrique presented her petition for a review of Dr. Priestley's account, it was competent for the court below to examine the entire record; and if it had appeared from the will of Hugh

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Bellas, and the codicil thereto, the record of the appointment of the trustee, the petitions for discharge and the action of the court thereon, the account filed by the trustee and the confirmation thereof, that an error in law had been committed, and that such error had been distinctly pointed out in the petition, the court below would have been justified in granting a review. Unfortunately for the appellee, no error of law is set forth in her petition, or appears anywhere in the record. It was a question of fact pure and simple, that the accountant had claimed commissions on money which had not passed through his hands. This was an objection which could as well have been taken when the account was filed, as it could several years after its confirmation and the death of the accountant. The act of 1840 was never intended to open accounts for the re-trial of questions of fact, years after they have been passed upon by a competent tribunal. The question of Dr. Priestley's commissions was adjudicated by the Orphans' Court years ago; it was a question distinctly appearing upon the face of the account; it was a challenge to any person objecting to come in and dispute it. As was said in Scott's Appeal, *supra*, "Something is due to the finality of judicial proceedings." As there was no error of law upon the face of this record, the appellee was not entitled to a bill of review as a matter of right; as there was no allegation of after-discovered testimony, she was not entitled to it as a matter of grace.

The learned judge below evidently relied upon Simpson's App., 18 W. N. 175, as authority for granting this review. An examination of that case, however, discloses the fact that there was one, if not two, errors of law apparent upon the face of the record. The account as guardian was prematurely and illegally filed, and the balance decreed to Mary V. Simpson was not coming to her, under the terms of her father's will, at the time the decree was made, and might never have been due her. It follows that the review in that case was strictly in accordance with our construction of the act of 1840. The review in this case was a departure from Milligan's Appeal, Scott's Appeal, and the cases cited.

The decree of the court below, granting a bill of review, and all proceedings subsequent thereto, are reversed and set aside at the costs of the appellee.

Statement of Facts.

No. 242.

OPINION, MR. CHIEF JUSTICE PAXSON:

This was an appeal from the same decree as Priestley's Appeal, just decided. In the latter appeal, we reversed the order of the court below granting a review of the account, and all the subsequent proceedings. The effect of this is to restore the confirmation of the account in controversy. The court below awarded \$980.34 to the accountant as commissions, which, together with some other small credits, left a balance due the accountant of \$1,042.50. This allowance is assigned for error upon this appeal. All that was said in Priestley's Appeal is applicable here. The question is precisely the same, and it appears that neither party was satisfied with the decree of the court below. The reversal of the decree in Priestley's Appeal necessarily requires its affirmance in this appeal.

The decree is affirmed upon the appeal of Ephraim Cutter, administrator, and the appeal dismissed at the costs of the appellant.

APPEAL OF THE COMMONWEALTH.

[ESTATE OF W. H. COOPER, DECEASED.]

FROM THE DECREE OF THE ORPHANS' COURT OF PERRY COUNTY.

Argued May 28, 1889—Decided June 28, 1889.

Where the land of a decedent passes under the intestate laws to his parents for life, and at their death to collateral heirs, the commonwealth is entitled to the collateral inheritance tax upon the appraised value of the land less the amount of the decedent's debts unpaid by his personal estate: the acts of assembly reviewed.

Before PAXSON, C. J., STERRETT, GREEN, CLARK and MITCHELL, JJ.

No. 250 January Term 1889, Sup. Ct.; court below, number and term not given.

On May 24, 1873, William H. Cooper died intestate, unmarried and without issue, but leaving to survive him a father and

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mother, brothers and sisters, and the issue of a brother, who was deceased. At the time of his death, the intestate was seised in fee simple of a tract of land situate in Spring township, Perry Co., Pa., containing 227 acres, more or less. Henry Cooper, father of the decedent, entered into and retained possession of the said real estate until his death on April 21, 1881, when he was succeeded by Sarah Cooper, the mother, who held the same until her death, which occurred on July 9, 1884. After the said real estate came into the hands of the collateral heirs at the death of their mother, partition thereof was made by the Orphans' Court of Perry county, and the entire tract was awarded to Frederick S. Cooper, one of the brothers of the decedent. On April 7, 1888, Frederick S. Cooper presented his petition to the register of Perry county, praying for the appointment of an appraiser to ascertain and fix the collateral inheritance tax due the commonwealth on the said tract of land, and Aaron M. Egolf was accordingly appointed an appraiser for that purpose.

From the report of the appraiser, Frederick S. Cooper, then the owner of the real estate appraised, appealed to the Orphans' Court, alleging that the appraiser erred in assessing tax upon the sum of \$6,256, instead of upon the sum of \$4,656.98.

The facts of the case sufficiently appear in the opinion of the court below, BARNETT, J., filed May 19, 1888:

William H. Cooper died in 1873, without issue, and seized of a tract of land situate in Spring township, in this county, containing about 227 acres. He left surviving him his father, his mother, and collateral heirs. His father died in 1881, and his mother died on July 9, 1884. On April 7, 1888, an appraiser was appointed for the purpose of ascertaining the collateral inheritance tax. He reported that he had valued and appraised the real estate of which the said William H. Cooper died seised "at \$28 per acre, for each and every acre thereof of 227 acres, which amounts to the sum of \$6,256, as of the 9th day of July, 1884, as the sum on which the collateral inheritance tax is to be assessed." He further reported the facts that W. H. Cooper at the time of his death was indebted to his father and others in the aggregate amount of \$2,998.42, and that after crediting the amount of his personal estate, to wit,

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\$1,399.40, there resulted a deficiency of personalty for payment of debts amounting to \$1,599.02. Now, if this deficiency be deducted from the valuation of the estate at date of the appraisement, to wit, the sum of \$6,256, there will remain \$4,656.98 as "the clear value" of said estate at the death of W. H. Cooper.

The appraiser also reported: "This balance of \$1,599.02, was paid by Henry Cooper, the father, who was also administrator of his son, William H. Cooper, deceased, but your appraiser is of opinion that inasmuch as the real estate descended intact to the collateral heirs, the tax must be assessed upon the said valuation of \$6,256, without abatement, with such interest from July 9, 1884, the period when the collateral heirs got possession, as the law requires."

Frederick S. Cooper, a brother of said decedent, "appeals from the valuation fixed by the appraiser, alleging that the tax should be upon \$4,656.98 instead of \$6,256, to the Orphans' Court of Perry county."

The determination of this question of valuation depends upon the construction of the acts of assembly relating to the subject.

The act of April 7, 1826, 9 Sm. L. 146, made all estates passing from any person who may die seised or possessed thereof, being within this commonwealth, to any person or persons other than father, mother, husband, wife, or lineal descendants, subject to a tax or duty on the clear value of such estates in excess of \$250, to be paid for the use of the commonwealth.

The act of April 22, 1846, § 14, P. L. 489, fixed said tax or duty at five per cent of the clear value of such estate.

In order to fix the valuation of such estates, the twelfth section of the act of April 10, 1849, P. L. 571, provides for the appointment of appraisers, "whose duty it shall be to put a fair valuation on said real estate," and "to assess and fix the then cash value of all annuities and life estates growing out of the same, upon which annuities and life estates the collateral inheritance tax shall be immediately payable out of the estate at the rate of said valuation." The thirteenth section of said act, provides that in case of a bequest or devise of any estate for life, with remainder over to collateral heirs, immediately after the death of the testator the estate so granted shall be

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appraised in the manner hereinbefore provided, and, after deducting the valuation of said life estate, "the collateral inheritance tax on the remainder shall be immediately due and payable over to the register of wills of the proper county." And the fourteenth section provides that on all estates subject to collateral inheritance tax, if the tax shall not be paid within one year, "interest shall then be charged at the rate of twelve per cent per annum on such tax, computing from time of said decedent's death."

Thus, it is apparent, the law recognized the estates for life and in remainder as liable each for its own tax, interest and penalty, and neither as liable for the other; and that the taxes both on the life estate (excepting the exempted interest in favor of father, mother, etc.) and the estates in remainder were due immediately upon the death of the decedent, and liable to the penalty of twelve per cent in default of payment. See *Commonwealth v. Smith*, 20 Pa. 100; *Commonwealth v. Eckert*, 53 Pa. 102.

Thus stood the law until the act of March 11, 1850, P. L. 170, provided that in all cases of descent, bequest or devise to collaterals or strangers in remainder, after the expiration of one or more life estates or a period of years, it shall be lawful for the parties so circumstanced liable for such tax to elect to wait their coming into the actual possession of the property subject to collateral inheritance tax, and in such case to give security to the register for the payment of said tax on the personal estate when they may come into such possession, together with six per cent per annum interest on the amount of the tax from the time the same accrued until paid; and the tax on the real estate shall remain a lien on said real estate until paid, bearing lawful interest as aforesaid. Thus, the payment of the tax by remaindermen, which before this act, was payable at the death of the decedent, may now, at their election, be postponed until they come into actual possession, upon proper security for its payment; then, with interest at six per cent from the date of decedent's death. They were in this manner relieved from the penalty until they came into possession, but not from the interest.

Next came the act of May 4, 1855, P. L. 425, which, by its own terms, and without requiring the tenant in remainder "to

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elect to wait, provided that the penalty shall not be charged against him on any collateral tax on any legacy or devise, until the same shall come into actual possession and enjoyment, and if such legatees or devisees shall elect to pay said tax in anticipation of the same coming into actual possession and enjoyment, the same shall be received at the then valuation of the legacy or devise, deducting the value of the life estate or term of years."

It is thus further apparent that, in estates liable to collateral tax, the commonwealth is entitled to a tax on the entire estate; that when the tenant for life or years, being parent or lineal descendant, etc., is exempt from liability, the whole tax on the entire estate must be paid by the tenant in remainder; that in such cases the time of payment is postponed until the estate comes into actual possession of the tenant liable; that, nevertheless, if such tenant elect, in anticipation to pay at the death of the decedent, the tax is assessable on the then valuation of the entire estate, less the value of the estates for life or years; that is, when the tenant of the intermediate estate is not liable, the tenant in remainder has the election either to pay tax on the entire estate with interest, when he comes into actual possession, or to pay at the death of the decedent the tax on the then net valuation of the estate in remainder; and in consideration of such anticipated payment, her right to a tax on the intermediate estate is waived by the commonwealth.

Thus, the law still remains, unless it has been changed by the recent act of May 6, 1887, P. L. 79. This statute is entitled "An act to provide for the better collection of collateral inheritance taxes." It is chiefly a compilation and re-enactment of all previous laws in force on the same subject. It makes but little change, except in the orderly arrangement and logical connection of previous enactments, omitting what has been supplied and retaining the alterations so made, and constitutes now probably the only statute law relating to collateral taxes. The only change affecting our present inquiry relates to the commencement of interest on taxes for which tenants in remainder are liable. The third section provides: "That, in all cases where there has been or shall be a devise, descent, or bequest to collateral relations or strangers liable to the collateral inheritance tax, to take effect in possession, or come into

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actual enjoyment after the expiration of one or more life estates, or a period of years, the tax on such estate shall not be payable, nor interest begin to run thereon, until the person or persons liable for the same shall come into actual possession of such estate by the termination of the estate for life or years, and the tax shall be assessed upon the value of the estate at the time the right of possession accrues to the owner aforesaid; provided that the owner shall have the right to pay the tax at any time prior to his coming into possession, and in such cases the tax shall be assessed on the value of the estate at the time of payment of the tax, after deducting the value of the life estate or estate for years." Thus the interest which, before this statute, began to run at the death of the decedent, now begins when the tenant in remainder has the right of actual possession. The twelfth section re-enacts the law previously in force regulating the appraisement for purposes of collateral tax; and the first section continues the provision that, on all estates subject thereto, the tax shall be "five dollars on every hundred dollars of the clear value of such estates."

But the appraiser was of the opinion that, because the real estate descended intact to collateral heirs, the tax must be assessed upon the valuation of the real estate, without abatement of the debts owing by the decedent at the time of his death. This, however, would exclude any room for the application of "clear value," and is inconsistent with the legislative intent in imposing the tax. This tax at first became due upon the death of the decedent. His debts were then a lien against his real estate, and the law authorized the land to be sold, if necessary, for their payment. The surplus only was liable to the tax. It is to be assessed, not upon the pecuniary value of the land coming to the tenant in remainder, but upon the clear value of the estate passing from the person who may die seised thereof. If an unmarried son purchase a farm for \$6,000, and having paid but \$2,000, dies, leaving it to pass to his father incumbered with the remaining \$4,000, and then to a brother after the father has extinguished the debt, and it is now valued at \$6,000 by the collateral appraiser, this is to tax, not the estate that passed from the son, but the different estate three times as great that passed from the father. But if it is the father's estate, it should pass from him to his other sons free from any

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such tax whatsoever. It is the same land that passes to the tenant in remainder, but not the same estate; and it is the estate that is to be valued and appraised, and not the land. An estate in land is the interest which the tenant hath therein, and for collateral tax purposes; this is measured by its "clear value," and not by extent of title. This is consistent with the provisions directing the valuation of the several estates for life and in remainder. Thus, when the tenant for life is a stranger, the value of his estate is fixed by the appraisement. It depends upon the clear value of the estate passing to him as affected by its probable duration. When once ascertained, it remains as to him unchangeable: *Commonwealth v. Freedley*, 21 Pa. 33.

If the tenant in remainder desired "to pay the tax at any time prior to his coming into possession," it is to be "assessed on the value of the estate at the time of the payment of the tax, after deducting the value of the life estate or estate for years." The value of his estate depends upon the clear value of the estate that passes from the person who died seised, and the probable duration of the preceding life estate. If the life tenant is old, or if his estate has already been enjoyed for a number of years, the tenant in remainder will not be kept out of his inheritance so long as otherwise, and the value of his estate would be the greater. When, therefore, the act declares that the tax shall be assessed upon the value of the estate, at the time the right of possession accrues to the owner, or that "the tax shall be assessed on the value of the estate at the time of the payment of the tax," it refers to the then quantum of the estate, after deducting the life estate, and not to the value of the land, which may be a very different estate from that which passed from the decedent. The act of 1887 simply provides for the better collection of collateral inheritance taxes. No other purpose is expressed in its title. It does not subject any other or different estates to the tax than is provided in previous statutes; if it did, it would be amenable to constitutional objection. It is still the estate passing from the deceased proprietor, that is liable to the tax, and that is the estate as it existed at the death of said proprietor. That estate consisted in the "clear value" of the real and personal property of which said proprietor died seised and possessed: *Commonwealth v. Eckert*, *supra*.

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We are of opinion, therefore, that the tax should be assessed upon \$4,656.98. Five per cent of the \$4,656.98 is the tax which was due and payable to the use of the commonwealth on July 9, 1884. This is the sum of \$232.85. This tax is liable to the penalty of interest at the rate of twelve per centum from that date. But, as we understand that a part of this tax has been paid, the parties liable are entitled to credit accordingly, and we will enter the following decree: . . .

A decree having been entered in accordance with the foregoing opinion, the commonwealth took this appeal, alleging that the court erred in assessing collateral inheritance tax upon the sum of \$4,656.98, instead of \$6,256, the value of the real estate when it came into the possession and actual enjoyment of the collateral heirs.

Mr. Charles H. Smiley (with him *Mr. W. S. Kirkpatrick*, Attorney General), for the appellant.

Mr. W. A. Sponsler and *Mr. B. F. Junkin*, for the appellee, were not heard.

PER CURIAM:

The opinion of the learned judge below is so full and satisfactory that we affirm this decree for the reasons there given by him.

Decree affirmed and the appeal dismissed at the costs of the appellant.

SAMUEL CALDWELL v. CHARLES MILLER.

ERROR TO THE COURT OF COMMON PLEAS OF NORTHUMBERLAND COUNTY.

Argued May 28, 1889—Decided June 28, 1889.

An agreement between persons engaging in business that each is to share directly in the profits as such, constitutes them partners as to third persons, whatever their arrangement may be between themselves; and in

Statement of Facts.

an action against them, as partners, to recover the price of goods sold after the date when the agreement was to expire, it is not error to instruct the jury that if they find the defendants continued to do business under the agreement, they were liable as copartners.

Before PAXSON, C. J., STERRETT, GREEN, CLARK and MITCHELL, JJ.

No. 275 January Term 1889, Sup. Ct.; court below, No. 320 May Term 1884, C. P.

On March 29, 1884, Samuel Caldwell filed an appeal from the judgment of a justice of the peace against him, in favor of Charles Miller. The action had been brought against George Keiffer and Samuel Caldwell, trading as Keiffer & Co., but Caldwell alone was served. In the Common Pleas the plaintiff declared against Caldwell alone. Issue.

At the trial on December 17, 1888, when the plaintiff offered proof that on July 18, 1882, he had sold and shipped leather to Keiffer & Co., to the amount of \$205.21, the defendant's counsel objected, on the ground that the jury had been sworn against Samuel Caldwell alone, and, there being no service on George Keiffer and no offer on the part of the plaintiff to show that Caldwell formed the company, the offer was irrelevant and incompetent to charge Caldwell with any part of the bill.

The declaration was then amended, charging Keiffer & Co., and the offer was admitted and exceptions sealed to defendant.

George Keiffer, called by the plaintiff, as if on cross-examination, testified that the shipment of goods was received by Keiffer & Co. Being examined by the defendant's counsel, he testified that he composed the firm of Keiffer & Co., himself, and Samuel Caldwell had no interest in that firm.

Plaintiff then offered a sealed agreement dated January 1, 1880, between Samuel Caldwell and George Keiffer, the execution of which was admitted, to be followed by evidence to show that the relation created by the agreement continued and existed at the time the bill of goods in suit was sold and delivered.

The defendant's counsel objected: (1) The paper does not prove or show a partnership existing between Keiffer and Caldwell at any time; (2) It proves a contract of hiring which was to continue one year, and expired by limitation more than

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one year before the creation of the debt in suit; (3) It would have no tendency to establish a partnership between Keiffer and Caldwell at the time of the contracting of the debt.

The offer was admitted under exception to the defendant, and the paper read to the jury as follows:

"Be it known to all to whom this may come that Samuel Caldwell, of the borough of Watsontown, and state of Pennsylvania, has now entered into the currying business and all its branches, and that it is hereby agreed and determined that the said Samuel Caldwell will continue in the said currying business for the term of one year from the date hereof, and that said Caldwell will employ George Keiffer, of Allegheny city, state aforesaid, as foreman and manager in said currying business with Caldwell's approval. In consideration of the said George Keiffer's whole service, skill, trade and good will as manager, he is to have after deducting all expenses, tools, labor, stock, merchandise, loss if by bad sales or debts and rents, the said Keiffer is to have one half of any profits. The profits to be ascertained by the books kept by Caldwell and by inventory of tools, fixtures and stock, quarter yearly on first of April, July, October and January, and that said Caldwell is to have One dollar and Fifty cents per day (\$1.50) for his services and use of team, and is to furnish capital for the amount of Five thousand dollars to be used in the currying business. And at the expiration of the said term of 1 year, if Caldwell elects to quit, the amount [he] invested is to be [received] by Caldwell and only profits to be divided share and share alike."

Other testimony was introduced by the plaintiff as proposed in the offer.

The defendant introduced testimony from which it was claimed that he was not a partner in the firm under the foregoing agreement; and at all events the partnership, if there had been one, terminated on December 31, 1881, when he retired from the business and leased his shop, tools and fixtures in writing to Keiffer, who had alone continued in the business.

At the close of the case on the testimony, the court, ROCKEFELLER, P. J., charged the jury, inter alia, as follows:

[We think, and so instruct you, that the terms of the articles of agreement between Samuel Caldwell and George Keif-

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fer, that each was to share in the profits, made them partners, as to third persons, although they may not have been so as between themselves.]² That question being disposed of, the important question seems to be, and it is one entirely for the determination of the jury, whether these two men, George Keiffer and Samuel Caldwell, were doing business in the month of June or July, 1882, under the provisions of the terms of the articles of agreement between them.

* * * * *

The defendant requests the court to charge the jury:

1. That as the plaintiff's bill was contracted July 18, 1882, and the plaintiff not having shown that he knew of the agreement made between Samuel Caldwell and George Keiffer, there could be no partnership by implication of law as to the plaintiff, which would bind Samuel Caldwell.

Answer: If Geo. Keiffer and Samuel Caldwell were doing business under the agreement referred to, at the time the plaintiff's bill was contracted, I do not answer this point as requested. As I have said in the general charge, the agreement made between Samuel Caldwell and George Keiffer, constituted them partners as to third persons, and if there was no other agreement between them, and the jury find that they continued to do business under that agreement, to and at the time the plaintiff's bill was contracted, in the firm name of Keiffer & Co., then I am of opinion, and so charge you, that Samuel Caldwell would be liable.¹

The jury returned a verdict in favor of the plaintiff for \$271.90. A rule for a new trial having been discharged, judgment was entered on the verdict, when the defendant Caldwell took this writ, assigning as error:

1. The answer to defendant's point.¹
2. The part of the charge included in []²

Mr. S. B. Boyer, for the plaintiff in error.

Mr. Lorenzo Everitt and *Mr. C. R. Savidge*, for the defendant in error, were not heard.

PER CURIAM:

This record presents the single question whether the agree-

Syllabus.

ment between Samuel Caldwell and George Keiffer, dated January 1, 1880, constituted them partners as to third persons. It was not contended that it created a partnership inter sese. As the agreement was in writing its construction was for the court. By the terms of the contract the profits were to be divided between them, "share and share alike." It would be an affectation of industry to review the cases upon this subject. That was done carefully and exhaustively by Justice SHARSWOOD in *Edwards v. Tracy*, 62 Pa. 374, where it was held that "a participant in profits directly as such is, as to third persons, a partner, whatever may be the arrangement between the partners:" citing *Gill v. Kuhn*, 6 S. & R. 337 and *Churchman v. Smith*, 6 Wh. 148. We can see no useful end to be attained by the discussion of a principle of law that is thoroughly well settled.

Judgment affirmed.

MARY J. STICKER ET AL. v. H. M. OVERPECK.

ERROR TO THE COURT OF COMMON PLEAS OF NORTHUMBERLAND COUNTY.

Argued May 28, 1889—Decided June 28, 1889.

- (a) In an action on an entire contract, whereby the plaintiff agreed to do the plumbing in the defendant's houses and to furnish the materials, including specified kinds of closets and heaters, the whole to be done in a workmanlike manner, the evidence as to the plaintiff's compliance with the contract being conflicting, it was not error for the court to instruct the jury in the general charge and in answer to points:
1. That if the plaintiff acted honestly, and in good faith substantially performed the contract, that was sufficient, and, if in certain minor particulars the contract was not complied with, the jury might deduct from the plaintiff's damages, the difference between the value of the work as it was turned over to the defendant, and what it would cost to have it completed in strict conformity with the contract.
 2. Nor, in such case, was it error to charge, substantially, that, under the plea of set-off the jury might set off against the plaintiff's claim the loss and damage, if any, occasioned to the defendant by the plaintiff's default, but that they could not render a verdict for the defendant for an excess of such loss and damage over the plaintiff's claim, if they should find such excess.

127	446
146	502
127	446
199	586

Statement of Facts.

Before PAXSON, C. J., STERRETT, GREEN, CLARK and MITCHELL, JJ.

No. 318 January Term 1889, Sup. Ct.; court below, No. 349 May Term 1884, C. P.

On April 14, 1884, H. M. Overpeck brought assumpsit against Mary J. Sticker and Isaac Sticker, her husband, to recover on certain contracts for work done and materials furnished in the erection for Mary J. Sticker of a building divided into three dwellings, and for extra work and materials. Pleas, non-assumpsit, payment, payment with leave, and set-off.

By one contract, the plaintiff agreed, for the sum of \$550, to furnish the materials and do the plumbing and gas fitting, and to furnish a "novelty or splendid" heater for each house, with all the attachments, the heaters being guaranteed to heat the dwellings in a satisfactory manner, and in case they failed to do so, to be replaced by others; also, to put in three Philadelphia water closets latest improved; all to be done in a workmanlike manner. By the other contract, plaintiff agreed to put in a tin roof, complete, and in a workmanlike manner, for \$250. Plaintiff claimed the amount of the two contracts and also \$223.70 for extra work and materials. \$225.73 was admitted to be due, and judgment was taken therefor. This suit was for the balance.

In defence, the defendant contended as follows: That the plaintiff failed to complete the contracts at the time agreed upon, whereby she lost tenants who had engaged to take the houses at a specified time; that the plumbing was so defectively done that the dwellings were rendered untenable, and the water closets furnished were not the kind agreed upon; that the heaters furnished were not the kind agreed upon, were second hand, not new, and did not sufficiently heat the dwellings, so that the defendant was obliged to remove them and substitute stoves; and that the plaintiff failed to put up troughs around the roof, as required by the contract. The defendant, and witnesses called by her, testified in support of her contentions, and she therefore claimed that as the contracts were entire, and had not been fulfilled by the plaintiff, he could not recover.

The plaintiff introduced his own testimony and that of

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various witnesses called by him, to the effect that he had substantially complied with his contracts, and that the interference of the plaintiff and her changes of the plans had caused him extra work to the amount claimed by him.

The court, ROCKEFELLER, P. J., charged the jury, *inter alia*, as follows:

* * * * *

[In addition to these contracts, the plaintiff claims for certain work which he alleges was extra work; that is, work independent and outside of these contracts. You heard his testimony and the testimony of his witnesses. He testified, as you will recollect, that he did fulfil and substantially perform all that he contracted to perform, and furnished all the materials in accordance with the terms of the agreements or contracts between the parties. . . . Now you have heard the testimony of Mrs. Sticker and her daughter and the other witnesses and you will determine from all the evidence in the case whether the plaintiff did perform his contracts. And, whilst the law is as I have stated, yet the law is founded on reason, and all that is required of a party who makes a contract is that he shall substantially perform it. If he goes on to finish his contract honestly and in good faith and does so substantially, although there may be some slight matters that he has not performed, yet he may recover, and the question as to whether he substantially performed his contract or not, is a matter to be determined by the jury from the evidence in the case.

In order to make my meaning plain in relation to this matter, I will refer you to a few cases decided by the Supreme Court. There are many of them, but a few will suffice. In the case of *Chambers v. Jaynes*, 4 Pa. 39, it was held: "A plaintiff, who has substantially and bona fide complied with the covenants on his part, in a written contract, is not precluded by slight omissions from receiving a fair compensation, according to such contract, where the breaches can be paid in damages." That was a contract for the erection of a building, and the judge trying the case said this: "The trifling omissions of a second coat of paint, on some of the window shutters and doors, and a grate in a cellar window, could be supplied at any time without injury or annoyance to the tenants." In the case

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of *Preston v. Finney*, 2 W. & S. 53, it was held: "An action upon a written contract, to recover the price of certain labor and services performed, will not be defeated by proof that the plaintiff failed in some slight particulars in his performance, if it appear that he acted with a bona fide intention of fulfilling his whole contract, and the other contracting received the fruit of his labor as performed." That was a case of a contract to deliver logs, and the Supreme Court said: "The contract was a very precise one. It specified not only the number of logs and time of delivery, but the mode of cutting, quality of them, the width to be not less than thirteen inches at the top end and the smallest logs not to be crooked, to be sixteen feet long, and not to be split in getting them down the hill. If the plaintiffs really and bona fide endeavored to fulfil the contract, and thought they had, but from accident or otherwise some did not measure to the width provided for, and were rejected as defective too late in the season to supply them, and the deficiency was no more than a small portion of the number stipulated," etc. In that case the plaintiff was allowed to recover, although there was some defect in the logs and they did not entirely come up to the contract. I will refer only to one more case, that of *Ellis v. Lane*, 85 Pa. 265: "The defendants contracted to rebuild a mill 'to be furnished with machinery in all respects similar to that in the mill burned.' The plaintiff contended that this was intended to mean all the machinery in the mill, whether in use or not. The court found that nearly all the machinery for which the plaintiff claimed damages had gone out of use or been laid aside, and that the only machinery in contemplation of the parties was that in actual use when the fire occurred, and that having been placed therein, the contract was substantially performed." That was a case which was submitted to the court to be tried by the judge without a jury, and Justice STERRETT, in referring to the finding of the judge before whom the case was tried, said: "He further found that the contract had been substantially performed by the defendants and that the greater part of the work was fairly done; but, for defects in the frame work, roof, etc., he deducted \$500 from the price agreed upon by the parties."

So you see, gentlemen of the jury, it becomes important for you under the evidence in this case to determine whether the

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plaintiff substantially performed his part of the agreements in evidence. If he did not, but only performed the contracts in part, he cannot recover the price agreed upon in the contracts; but if, on the other hand, you find that he substantially performed the agreements, then we think he is entitled to recover. Now, you heard the testimony of Mrs. Sticker and her witnesses in regard to many of the items, water closets, for instance. She claims they were not in accordance with the contract; that they were not the latest Philadelphia improved; that they were not such water closets as were to be furnished and put in her house under the contract in evidence. But if these are only slight and immaterial matters, the plaintiff, as I have shown you, would still be entitled to recover, the jury of course making proper deductions from the contract price for any damages sustained by her by reason of the plaintiff not fully complying with his contract. The jury in such case should deduct whatever it would cost to put those slight matters in place, in accordance with the terms of the contract of the parties.]⁶

* * * * *

The plaintiff asks the court to instruct the jury:

2. The measure of damages in the plumbing work is what it would cost or the value of what it would cost to put it in the condition contracted for.

Answer: This is correct, if the jury find that there was a substantial compliance with the contract on the part of the plaintiff.¹

4. If the plumbing work was defective, it was the duty of Mrs. Sticker, the defendant, to proceed without delay to have the defects remedied and the job complete, and the measure of damages can be no more than the difference between the value at the time it was turned over to the defendant and the value when complete, or, in other words, the cost of making it as contracted for, if it was not so.

Answer: If the jury find that the plaintiff acted honestly and in good faith and substantially performed the contract, this point is correct.²

By the defendant, the court is asked to charge:

5. The plaintiff, having undertaken by his contract to furnish three water closets, one for each house, called Philadel-

Charge of Court below.

phia water closets with latest improvements, and the uncontradicted evidence being that he furnished only one such closet, the contract being an entire one for the gas fitting, plumbing and heating for \$550, he cannot recover in this suit anything on account of said contract.

Answer: This point is affirmed, but I refer the jury to the evidence in relation to the furnishing of the water closets, and leave it to you to determine whether the plaintiff did in good faith substantially perform the contract.³

6. The contract contemplates new material, and if the jury believe that plaintiff furnished defendant second-hand heaters, without her knowledge or consent, the \$550 contract was not complied with and there can be no recovery on the same.

Answer: This point may be affirmed. The jury, however, is referred to the evidence in relation to the heaters; that they had been in use but a very few weeks, and if they were substantially new and the plaintiff in good faith substantially performed his contract, I cannot say there can be no recovery on the same.⁴

7. If the jury believe that, by reason of bad plumbing and defects in the heaters, the defendant was obliged to procure other means of heating her house, and to spend money in repairing and trying to remedy the defects in plumbing, to try to make the house tenantable and safe to live in, and that by reason of such defective heaters and plumbing the defendant sustained a loss of tenants who had rented, and thereby a loss of rents, the amount of such losses and damages can be set off against the plaintiff's claim; and if the amount of such loss and damages, with the \$575 paid, are found to exceed the amount of the plaintiff's claim, the jury should render a verdict in favor of the defendant for the sum or amount which the said losses and damages exceed the plaintiff's legitimate claim.

Answer: If the jury find the facts stated in this point, I answer it as requested, but I cannot charge you that you may render a verdict in favor of the defendant for any sum or amount which the losses and damage exceed the plaintiff's claim. A defendant may plead a set-off and be entitled to a certificate for an amount found in his favor under the defalcation act. In the case of *Vicary v. Moore*, 2 W. 451, Chief Justice GIBSON said: "In *Gogel v. Jacoby*, 5 S. & R. 117, it was held that

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damages for malfeasance in the execution of a contract cannot be set off in an action in suit in order to procure such a certificate." Perhaps the certificate can only be given in case the set-off is founded upon a bond, bill, receipt, account or bargain, which are the matters allowed to be set off under the act.⁵

The jury returned a verdict for the plaintiff for \$493.31, and judgment was entered thereon; whereupon the defendant took this writ, assigning for error:

- 1, 2. The answers to plaintiff's points.^{1 2}
- 3-5. The answers to defendant's points.^{3 4 5}
6. The part of the general charge recited.⁶

Mr. C. R. Savidge and *Mr. S. P. Wolverton*, for the plaintiff in error.

Mr. W. H. Hackenberg (with him *Mr. P. L. Hackenberg*), for the defendant in error.

PER CURIAM:

If there is anything the matter with this case it is the verdict, and with that we have nothing to do. There was evidence to justify the learned judge in submitting to the jury the question of a substantial compliance with the contract. Such evidence may be generally anticipated, now that the plaintiff is a competent witness. Whether the jury should, under all the evidence in the cause, have found such substantial compliance, was a matter which was for the consideration of the court below upon a motion for a new trial. It does not concern this court; hence we express no opinion upon it. A careful examination of the case fails to disclose error in those portions of the charge contained in the first six assignments. The seventh and eighth assignments allege error in the admission of evidence. As they are not in compliance with the rule of court they have not been considered.*

Judgment affirmed.

*See *Hawes v. O'Reilly*, 126 Pa. 440; *Battles v. Sliney*, 126 Pa. 460.

ROBERT FORGY, JR., v. SAMUEL McWILLIAMS.

ERROR TO THE COURT OF COMMON PLEAS OF MIFFLIN COUNTY.

Argued May 28, 1889—Decided June 28, 1889.

An agreement signed by two persons, that "if the guardian, W., shall buy in certain real estate we, the subscribers, hereby agree and bind ourselves to bear equal shares of the loss (with his two wards), which may be sustained by the property bringing less than the face of the mortgage and its interest;"—is a joint undertaking between the subscribers and W.: as to the guardian, the subscribers are sureties, and each undertakes to make him whole as to one half of the loss.

Before PAXSON, C. J., STERRETT, GREEN, CLARK and MITCHELL, JJ.

No. 404 January Term 1889, Sup. Ct.; court below, No. 76 November Term 1886, C. P.

On October 27, 1886, Samuel McWilliams, guardian of James and Joseph Forgy, minor children of James Forgy, deceased, brought covenant against Robert Forgy, Jr., and David S. Forgy, also children of the decedent, but of full age. The defendants pleaded, covenants performed, absque hoc.

On April 19, 1888, by agreement of counsel the cause was submitted to the court without a jury, under the act of April 22, 1874, P. L. 109, and at the hearing the facts were shown to be as follows:

James Forgy died, leaving the four sons above mentioned. As part of the share of the minors in their father's estate, there was assigned to McWilliams, as guardian, a mortgage made by George Hanawalt to the father for \$4,448.16. Subsequently, Hanawalt made an assignment for the benefit of creditors and his realty was sold on November 4, 1876. On the day of the sale, but prior thereto, McWilliams procured the following agreement from Robert Forgy, Jr., and David S. Forgy.

November 4, 1876.

If the guardian, Samuel McWilliams, shall buy in certain real estate to be sold this day as the property of George Hanawalt at his assignees' sale, we, the subscribers, hereby agree

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and bind ourselves to bear equal shares of the loss (with his wards, J. and J. Forgy,) which may be sustained by the property bringing less than the face of the mortgage thereon and its interest, at any sale hereafter to be made by him, and we are to be benefited if it brings more; no sale to be forced within three years.

Witness our hands and seals.

R. FORGY, JR. [SEAL.]

D. S. FORGY. [SEAL.]

McWilliams accordingly bought the property at the sale for \$1, subject to the mortgage. On April 19, 1888, the property was re-sold at a loss of \$3,519.20. McWilliams then brought this suit upon the above agreement to recover one half the loss, to wit: \$1,759.60. David S. Forgy was not served. Robert admitted his liability for one fourth of the loss, and made tender thereof, which was refused.

The court, BUCHER, P. J., finding the foregoing facts, on January 1, 1889, filed the following opinion:

It must have been observed, from the statement of the facts found, that the solution of the question involved depends upon the construction to be given to the agreement entered into between the parties on November 4, 1876. The contention of the plaintiff is that by force of the agreement the defendant, Robert Forgy, Jr., is bound for the one half of \$3,519.20, the whole loss, or \$1,759.60, with interest from April 19, 1888, and not simply for the one fourth of the entire loss, to wit, \$879.80, as defendant contends.

The agreement is in writing and its construction is for the court. The language employed is, "If the guardian, Samuel McWilliams, shall buy in certain real estate we, the subscribers, hereby agree and bind ourselves to bear equal shares of the loss (with his wards, J. and J. Forgy,) which may be sustained by the property bringing less than the face of the mortgage thereon and its interest and we are to be benefited if it brings more." This is a joint undertaking between the defendants and McWilliams. They agree with him that they will make up the loss to him, if he will buy; and, while the undertaking is several as between themselves, so that on a recovery against the one the other could

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sue for compensation, yet as to the guardian they are sureties, and each undertakes to make him whole just as if they had given their joint note. The expression, to bear equal shares, defines the amount which is to be paid, and not the manner of the payment. It defines and ascertains the amount to be paid to the guardian, but does not fix and ascertain the amount to be paid between themselves. I cannot see how it can be pretended, in the face of the language of the agreement, that each of the defendants is only liable for the one fourth of the loss as to the guardian, McWilliams, for there is a promise which, while two make it, is yet the promise of each. The act of April 6, 1830, P. L. 277, cuts up the distinction between joint and several obligations: *Lewis v. Williams*, 6 Wh. 268; *Moore v. Hepburn*, 5 Pa. 402. It seems clear that either of the makers of the agreement is liable for the one half of the whole loss, and if the defendant here pays it all he can sue his fellow for contribution.

From the evidence we find that the defendant, Robert Forgy, Jr., is indebted to the plaintiff in the sum of \$1,759.60, with interest from April 19, 1889.

Exceptions to this finding having been dismissed, judgment was entered for the plaintiff accordingly. Thereupon the defendant took this writ, alleging that the court erred in finding that the written agreement was a joint undertaking, and that under it defendant, Robert Forgy, Jr., was liable as surety to pay the share of his brother, David S. Forgy.

Mr. Rufus C. Elder (with him *Mr. Geo. W. Elder*), for the plaintiff in error.

Mr. D. W. Woods (with him *Mr. John A. McKee*), for the defendant in error.

PER CURIAM:

We affirm this judgment upon the opinion of the learned judge of the court below.

Judgment affirmed.

JACOB LONG ET AL. v. CATHARINE PAUL ET AL.

ERROR TO THE COURT OF COMMON PLEAS OF NORTHUMBER-
LAND COUNTY.

Argued May 28, 1889—Decided June 28, 1889.

- (a) A testator devised to his widow the "improvement and income" of his realty, "to keep for her own use, as long as she keeps my name." A subsequent provision directed that the widow should pay testator's debts, and if necessary should sell part of the realty for this purpose and keep the rest.
- (b) Another provision directed that in case the widow re-married, she was to have "the one half of all my real and personal property for her own use, and the other half I bequeath to my three sisters;" and in case such division could not be made without spoiling the whole, the executor should sell the property and "divide money as directed."
1. Taking the whole will together, it created an estate for life determinable on the second marriage of the devisee: *Cooper v. Pogue*, 92 Pa. 254; and the devise was not enlarged by the subsequent provisions for the payment of debts and for the division of the property on the widow's re-marriage.
 2. Upon a case stated, for the purpose of construing a will, it is not error for the court in its opinion to refer, by way of illustration and in confirmation of its views, to certain clauses in an auditor's report made in a previous cause under the same will.

Before PAXSON, C. J., STERRETT, GREEN, CLARK and MITCHELL, JJ.

No. 433 January Term 1889, Sup. Ct.; court below, No 57 February Term 1888, C. P.

On December 26, 1888, Catharine Paul, et al., children and a grandchild of Cornelius Maurer, deceased, brought ejectment against Jacob Long and Rachael, his wife, to recover certain realty of which the said decedent died seised. The cause was submitted to the court in the form of a case stated, which showed the facts following:

1. That the title for the land mentioned in the writ of ejectment in this case, was out of the commonwealth, on April 1, 1875.

Statement of Facts.

2. Samuel Weary was the owner in fee-simple of said land, and on April 1, 1875, conveyed the same by deed to Cornelius Maurer, his heirs and assigns.

3. That Cornelius Maurer, the grantee in said deed, made a will providing:

* * * * *

"As to such estate as it has pleased God to intrust me with, I dispose of the same as follows, viz.:

"I give and bequeath to my beloved wife Sarah Maurer, all my household furniture, my library in my mansion or dwelling house my cow and heifer and hogs chickens and all my carpenter tools and all grain and other personal property not mentioned also all moneys and money due me or hereafter may come due to be collected by my beloved wife Sarah Maurer herein named as soon after my deceased as can be consistently with a property settlement of all my debts; and to have an to hold the same to her and assigns, and I also give devise and bequeath to her my said wife Sarah Maurer all my improvements and income of my messuage and lot and house where I now live and all that peace of land where Samuel Weary lived now deceased bud now occupied by his wido Catharine Weary on which a dwelling house and barn is on containing 93 acres more or less with its appurtenances; and all that piece or parcels of land situated &c here described on the South by Mahanoy Creek on the West by Benjamin Kness and others on the North by land of the estate of Thomas Henninger on the east by lands of Amos Vastine and my beloved wife Sarah Maurer is to pay all my debt and if she cannot pay it she shall sell so much of the land to pay for the rest of the land and keep it for her one youse, as long as she keeps my name and after she marries and dound keep my name any more she shall have the one half of all my real and personel property for her own youse and the other half I beques to my 3 sisters share and shore alike Catharine intermarried to Elias Paul, Sellome intermarried with John Groh, Lusina intermarried with Joseph B. Becker.

"Lastly I appoint my esteemed friend Jarred Henninger to be the executor of this my last will and testament after my beloved wife Sarah Maurer dound keep my name my above executor shall thevide it to my wife the one half of all real

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and personall property and the other half to my three sisters share and share alike if can be devided without spoyling the hole if spoyling the hole he shall selling it at public sale and divided the money is directed in witness whereof, I Cornelius Maurer the testator have to this my will written on one sheet of paper set my hand and seal this tenth day of September A. D. one thousand eight hundred and seventy eight."

4. That the testator died on September 21, 1878, and the will was probated on October 9, 1878, and letters testamentary granted to Jarred Henninger, the executor named in the will.

5. The testator left surviving, Sarah Maurer, his widow, (no children,) and the three sisters named in the will, to wit: Catharine, intermarried with Elias Paul; Salome, intermarried with John Groh, and Lucina, intermarried with Joseph B. Becker; Lucina and her husband, Joseph B. Becker, both died since the death of the testator, and left, surviving, James D. Becker, a son, who with the other two sisters are the plaintiffs in this case.

6. That Sarah Maurer, his widow, did not re-marry, but died as the testator's widow, and she left surviving her Jacob Long, father, and Rachael Long, mother, and brothers and sisters, who are in possession of the premises mentioned in the writ of ejectment.

7. If the court be of opinion that the title and right of possession to the land described in the writ of ejectment, (which is made part of this case stated,) vested, upon the death of the testator or his widow, in the plaintiffs under the intestate laws, then judgment to be entered in favor of the plaintiffs. If, however, the court be of opinion, that a fee passed under the will to the widow, then judgment to be entered for the defendants for the premises mentioned in the writ. The costs to follow the judgment, and either party reserving the right to sue out a writ of error therein.

On March 7, 1889, the court, ROCKEFELLER, P. J., filed the following opinion:

The question in this case is whether under the will of Cornelius Maurer, the testator, his widow took an estate in fee, or a life estate, or during widowhood only. If she took a fee, then the defendants, who are her heirs, are entitled to recover

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the land in question ; but if she took a life estate or during widowhood only, then the plaintiffs, who are the heirs of the testator, are entitled to recover.

It is alleged that the scrivener, a justice of the peace, who wrote the will, was an uneducated Pennsylvania German, and this is abundantly manifested throughout the whole will ; but still, we think that it was the intention of the testator to give his widow an estate, to remain hers so long as she should be or remain unmarried after his decease. Such intention is pretty clearly expressed.

When a testator gives all his real and personal estate to his widow, as long as she shall remain unmarried and his widow, these are words of limitation which clearly show it to have been the intention to limit the duration, at longest, to the natural life of the widow. They can mean no more than during widowhood. In such a case, where there is no devise over, the remainder goes to the heirs under the general inheritance laws. Even a power to sell does not enlarge the estate to an absolute fee. Such authority confers only a power and not property : *Cooper v. Pogue*, 92 Pa. 254.

In the case now before the court, in the first place, the will gives the widow and her assigns, all the personal estate, and as regards the real estate, it gives it to her as follows : " And I also give and bequeath to her, my said wife, Sarah Maurer, all my improvements and income of my messuage, and lot and house where I now live, (being the land for which this ejectment is brought, and also other lands therein described,) and my beloved wife, Sarah Maurer, is to pay all my debt, and if she cannot pay it, she shall sell so much of the land to pay for the rest of the land, and keep it for her one youse as long as she keeps my name." Then follows a direction as to what shall be done, in case the widow marries again, or does not remain his widow, which is as follows : " And after she marries and dound keep my name anymore, she shall have the one half of all my real and personal estate for her own youse, and the other half I beques to my 3 sisters share and share alike, Catharine intermarried with Elias Paul, Sellome intermarried with John Groh, Lusina intermarried with Joseph B. Becker." Then after the appointment of an executor, the will further reads as follows : " After my beloved wife Sarah Maurer dound keep my name

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my above executor shall divide it to my wife, the one half of all real and personal property and the other half to my three sisters share and share alike if can be divided without spoiling the hole if spoiling the hole he shall selling it at public sale and divided the money is directed."

It is strenuously contended, on the one hand, that under the said latter parts of the will, in case the widow had re-married, she would have taken an estate in fee in the one half of the land, or in case of a sale, one half of the proceeds absolutely; and that that being the case, it follows that the testator intended to vest a fee in the whole of the land in the widow, in the first instance. [On the other hand, it is argued, and it was so held by the learned auditor, that by the said latter clauses it was only intended that in the event of the widow re-marrying she should have the one half of the real and personal estate "for her own use;" that is, to be used by her during life.]³ As the widow did not re-marry, no question of that kind arises in the case, except so far as the whole will must be taken together in order to ascertain the intention of the testator.

It is well settled as a general rule of law, that a devise of the rents, issues and profits of land, is equivalent to the devise of the land itself, but the intent to dispose of land is not usually manifested by disposing of the income, rents, and use only thereof; and in such cases, it has always been held that the devisee only takes the land for such length of time as he is given the income, rents and profits: *France's Est.*, 75 Pa. 220. In the present case, it being clear that the will only gives the improvement and income of the land, or the land itself to the widow, for her own use during widowhood, which would mean, at the longest, during the natural life of the widow, I am of opinion that it by no means follows that the latter clauses giving her the one half of the estate for her own use, or the one half of the proceeds of a sale in case of re-marriage, necessarily enlarges the life estate given in case she remained unmarried. The one is a provision in case the widow remained unmarried, and the other a provision in case she re-married.

I think it is quite likely that the scrivener intended to create a life estate only in the one half of the whole estate in case the widow re-married, but perhaps he has not clearly so expressed

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it. Looking at the whole scheme of the will, nothing would seem more natural. The meaning of the will in this respect may be doubtful, but in that case the construction is to be as conformable as possible to the general rules of inheritance: France's Est., supra. If the contention of the plaintiffs is correct, the land goes to the parties who would be entitled to the same under the general inheritance laws of the state; but, if the construction contended for by the defendants should be adopted, it would go to parties who are entire strangers to the blood of the testator. [The same construction contended for by the plaintiffs, it seems, was put upon the will by the widow herself, when a part of the proceeds of sale of some of the land sold by the executor and the widow, for the payment of debts, was distributed by the Orphans' Court of this county. See report of W. B. Faust, Esq., auditor, filed January 7, 1884, and the opinion of the court, confirming the same, filed April 7, 1884.]³ The learned auditor gave her the interest on the proceeds, which represented the land, and she expressly declined, in writing, to accept.

I am of opinion that the title and right of possession of the land described in the writ of ejectment, admitted at the argument to be the same land described in the will as the messuage and lot and house where the testator lived, vested upon the death of the testator and his widow, in the plaintiffs, the heirs of the testator, and therefore, judgment in favor of the plaintiffs.

Exceptions to the foregoing decision were dismissed by the court, whereupon the defendants took this writ, specifying that the court erred:

1, 2. In entering judgment on the case stated in favor of the plaintiffs.

3. In considering matters not part of the case stated or facts admitted upon which the court was to pass and enter judgment. []^{3 3}

Mr. S. B. Boyer, for the plaintiffs in error.

Mr. Chas. B. Witmer, for the defendants in error.

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OPINION, MR. JUSTICE MITCHELL:

The draughtsman of this will had a very limited command of the English language, and even this was evidently hampered by the recollection of the form book. But taking the whole will together the testator's intention is reasonably clear to give his wife the use and income of his whole estate so long as she remained his widow, and of half of it in case she re-married, but not in either event to give her more than a life estate in the realty. The lands are expressly given to her "to keep for her own use, as long as she keeps my name," which is plainly a gift during widowhood, and therefore, an estate for life determinable on a second marriage. In this regard the case is not distinguishable from *Cooper v. Pogue*, 92 Pa. 254, and indeed is by no means so strong a case for plaintiffs in error's contention as that was.

The first devise as to realty is of the "improvements and income" of his dwelling house, and it is conceded that these words in general carry the land. But the gift of the improvements and income is only "so long as she keeps my name," and cannot be more effective than a gift of the land itself, which, expressed in those terms, would not extend beyond a life estate.

Nor is this estate enlarged by the provision that she shall pay the debts, and if she cannot (otherwise) she shall sell so much of the land as will enable her to keep the rest. This is only a power, not an estate, and is limited to the payment of debts, thus merely enabling the devisee to do in her own way what the law would do compulsorily for her without this provision. So far indeed as this clause of the will bears upon its construction at all, it would seem to indicate that the testator himself did not intend to give a fee; for, if he had done so, the power of sale would have been superfluous, except as a matter of convenience on account of the possibility of the determination of the estate by a second marriage.

But after the devise to the widow so long as she remains unmarried, there is a provision for the case of her re-marriage, in which event she is to have "the one half of all my real and personal property for her own use, and the other half I bequeath to my three sisters" etc., and the further provision that the executor shall make the division, and if it cannot be done without spoiling the whole, then he shall sell the property and

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"divide the money as directed;" and it is argued that this is a gift of the corpus of one half in case of re-marriage, and therefore, unless the first estate was a fee, a larger provision in case of second marriage than in the event of remaining a widow, which would be clearly contrary to the testator's main intent. While a fee in one half would probably have been called by the early lawyers an estate of higher dignity than a life estate in the whole, I am not aware of any rule which would enable us to say as a matter of law that it was a larger or more favorable provision for a widow. That is a question of fact which depends on circumstances, and must always be largely a matter of individual choice. But it is by no means clear that this is the proper construction of the provision in case of re-marriage. On the contrary the repetition of the phrase "for her own use" seems rather to be meant to continue the idea of a life estate contained in the preceding clause, and if so, the direction to the executor to make the division of the property, and if that cannot be done, to sell, and divide the money, would be subject to the same limitation, to wit, to her own use for life. As the widow however did not re-marry, our only concern with these parts of the will is their bearing on the construction of the previous clause, and as to it they give us very little light.

On the whole will, even if the intent to give only a life estate were more doubtful than it is, we could not distinguish this case from *Cooper v. Pogue*, already cited. With variations of language the substance of the gifts is identical, and while will cases are rarely precedents for more than the principles they illustrate, yet where there is such substantial identity, not only in intent but in expression, the prior case is at least very strong confirmation of the correctness of the view we have taken of the present. And the same remarks apply with great force to the notably analogous case of *Nash v. Simpson*, 78 Me. 142.

The learned judge below gave the true construction to the will, and we do not think his reference to the auditor's report, etc., in a previous cause under the same will, was going outside of the case stated for facts, but only a reference by way of illustration and confirmation of his views, to an authority that was necessarily very pertinent.

Judgment affirmed.

WILLIAM H. BAHNER v. STONE VALLEY
M. F. INS. CO.

ERROR TO THE COURT OF COMMON PLEAS OF NORTHUMBER-
LAND COUNTY.

Argued May 28, 1889—Decided June 28, 1889.

Where a policy of fire insurance provided that "the aggregate amount insured in this and all other companies on the above mentioned property, shall not exceed two thirds of the cash value," and the plaintiff's evidence in an action thereon showed that the assured subsequently took out a policy in another company on the same property, and that the amount of insurance in the two companies exceeded two thirds of the cash value of said property, it was not error to enter a compulsory nonsuit.

Before PAXSON, C. J., STERRETT, GREEN, CLARK and MITCHELL, JJ.

No. 204 January Term 1889, Sup. Ct.; court below, No. 398 May Term 1887, C. P.

On April 21, 1887, William H. Bahner brought debt against the Stone Valley Mutual Fire Ins. Co. to recover on a policy of insurance issued by the company defendant.

The policy was issued on August 2, 1884, and contained the following provision: "Provided, however, and it is hereby declared that the aggregate amount insured in this and all other companies, on the above mentioned property, shall not exceed two thirds of the cash value." The insurance on certain of the plaintiff's property, as recited therein, was as follows: barn, \$466; produce, \$400; utensils and reaper, \$200.

On November 6, 1886, plaintiff took out a policy in the Phoenix Ins. Co. under which, inter alia, the following of his property was insured for the amounts stated: barn, \$475; produce, \$600; utensils and reaper, \$130. At the time of taking out this second policy, plaintiff gave no notice of the fact to the defendant company, but there was no evidence of a provision in the defendant's policy requiring such notice.

On January 5, 1887, plaintiff's property was accidentally

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destroyed by fire. An adjuster from the Phoenix Ins. Co., adjusted the loss, and apportioned it as follows: Due the plaintiff from the Phoenix Ins. Co. \$793.48, and from the Stone Valley Co. \$625.47. The Phoenix Ins. Co. subsequently paid its proportion, but the defendant company refused to do so, on the ground that the condition of its policy prohibiting insurance to more than two thirds of the value of the property insured had been violated: hence this suit.

In the statement of loss furnished by the plaintiff to the defendant company, which was signed and sworn to by him, and which was in evidence, the values of the property insured were stated as follows: barn, \$700; hay, grain and straw in barn, \$600; farming implements, \$300; total, \$1,600. On the trial, plaintiff testified that this was a low estimate of the cash value of the property at the time it was destroyed.

At the close of the plaintiff's testimony the defendants moved for judgment of nonsuit. The motion was granted, and judgment of nonsuit entered with leave, etc.

The rule to show cause why the judgment of nonsuit should not be lifted having been argued, the court, ROCKEFELLER, P. J., filed the following opinion:

The plaintiff gave in evidence his policy of insurance on which this suit was brought, which policy contains a provision which is as follows: "That the aggregate amount insured in this and all other companies, on the above mentioned property, shall not exceed two thirds of the cash value." He then proved, by his own oath, the cash value of the property insured, both at the time the insurance was taken, and at the time of the loss. He also gave in evidence a subsequent policy of insurance on the same property, and the two policies in evidence showed conclusively that the aggregate amount insured in the two companies, on the property mentioned therein, exceeded two thirds of the cash value. There was no notice given to the defendant company of the subsequent policy. Indeed the plaintiff testified that at the time he procured the second policy, he thought the first had expired. This evidence, we think, put the plaintiff entirely out of court. He may have supposed that the defendant would offer evidence to prove the cash value of the property, and closed his case. But the defendant did

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not dispute the valuation of the property as established by the plaintiff himself, and without offering any testimony, moved the court for a nonsuit, which was granted. If the defendant had offered any evidence as to the cash value of the property insured, it is very probable the court would have permitted the plaintiff to call witnesses in rebuttal, even if it would have been out of order. The defendant not having offered any such testimony, it became unnecessary for the plaintiff to call any other witnesses.

In the case of *Insurance Co. v. Slockbower*, 26 Pa. 199, it was decided that, "where a policy of insurance provides 'that the aggregate amount insured in this and other companies, on the above mentioned property shall not exceed two thirds of the estimated cash value,' any further insurance, being in violation of the agreement, would render the policy void." The case of *Mitchell v. The Lycoming Mut. Ins. Co.*, 51 Pa. 402, decides the same thing. See, also, *Lycoming M. Ins. Co. v. Mitchell*, 48 Pa. 367, and *Simpson v. Penn. F. Ins. Co.*, 38 Pa. 250. It is contended that these cases are not to the point, for the reason that the respective clauses therein are against over insurance on the estimated cash value, whereas the present policy provides that the aggregate amount insured on the property "shall not exceed two thirds of the cash value." I take it, that in order to recover under the terms of the policy in suit, it was indispensably necessary for the plaintiff to prove the value, for the policy provides as follows: "The said loss or damage to be estimated according to the true and actual value of said property at the time of the loss." The plaintiff did prove the cash value of the property, if he proved anything, both at the time of insuring and the loss.

In the brief furnished by the plaintiff's counsel, it is strenuously contended that the policies of insurance, in the present case, show it to be a case of double insurance. I am of opinion that this is correct, and that for that very reason there can be no recovery on the policy in suit. The cases of *Sloat v. Royal Ins. Co.*, 49 Pa. 14, and the New York case therein cited and so much relied on by the late Chief Justice READ, are cited to show that the present is a case of double insurance. Both those cases point out what is and what is not double insurance, and it was held in both that the character of the

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respective policies in question in each, did not make them cases of double insurance, and that they were, for that reason, not within the meaning of a clause in the first policies prohibiting double insurances without notice to the insurer. I think no one can read the present policies and come to the conclusion that they do not constitute, as regards the property destroyed by the fire, a case of double insurance, and that is just what the clause referred to in the policy in suit was intended to prohibit, beyond two thirds of the cash value.

The rule is discharged.

Thereupon the plaintiff took this writ, assigning for error the entering of the judgment of nonsuit and the refusal to vacate said judgment.

Mr. S. B. Boyer, for the plaintiff in error.

Mr. J. Nevin Hill (with him *Mr. George Hill*), for the defendant in error.

PER CURIAM:

An examination of this record fails to convince us that the learned judge below committed any error in entering a compulsory nonsuit. The evidence shows that the plaintiff was insured in excess of two thirds of the cash value of the property. This was in direct violation of that clause or condition of defendant's policy which provides "that the aggregate amount insured in this and all other companies, on the above mentioned property, shall not exceed two thirds of the cash value." Under such circumstances there was nothing to submit to the jury.

Judgment affirmed.

LINN C. LIGHTNER v. SAMUEL R. LIGHTNER.

ERROR TO THE COURT OF COMMON PLEAS OF PERRY
COUNTY.

Argued May 29, 1889—Decided June 28, 1889.

- (a) A testator by his will, after bequeathing a legacy of \$1,000 to his son H., divided the residue of his estate equally between his two sons H. and L., and then provided: "I desire that my son L. receive \$1,000 as soon as he arrives at the age of 21 years, and that the remainder of his share be invested in a farm, he, the said L., having full control of the farm, and receiving all proceeds therefrom, but not having power to sell," with remainder to his children.
1. In such case, the testator's intention was, that upon attaining his majority L. should have \$1,000 paid to him absolutely, and it was error for the court below to deduct therefrom advances made for L.'s maintenance, by his guardian, from time to time, under decrees of the Orphans' Court.
 2. The remaining gift to L., under the will, was a present and absolute interest for life in the fund, vested upon the death of the testator. The income followed the title and was L.'s absolute property, applicable during minority to his maintenance, under direction of the court, but the accumulations payable to him at majority, in addition to the \$1,000.

Before PAXSON, C. J., STERRETT, GREEN, WILLIAMS and MITCHELL, JJ.

No. 43 July Term 1889, Sup. Ct.; court below, No. 38 April Term 1889, C. P.

On March 1, 1889, a case stated in the nature of a special verdict, was submitted, wherein Linn C. Lightner was plaintiff, and Samuel R. Lightner, guardian of Linn C. Lightner, was defendant. The case stated set out the following facts:

1. That Wm. H. Lightner, died on June 19, 1886, testate, resident of the township of Tyrone, county and state aforesaid, leaving to survive him two sons, Linn C. Lightner, of whom Samuel R. Lightner is guardian, and Horace W. Lightner, of whom Henry P. Lightner is guardian, the said Linn C. Lightner, arriving at the age of twenty-one years on or about March 25, 1889.

Statement of Facts.

2. That contained in the will of the said Wm. H. Lightner, deceased, is, *inter alia*, the following:

"I desire that my son Linn C. Lightner receive \$1,000 as soon as he arrives at the age of 21 years, and that the remainder of his share be invested in a farm, he the said Linn C. Lightner having full control and management of farm, and receiving all revenues and proceeds therefrom, but not having power to sell or convey said farm; and in case that the said Linn C. Lightner dies without legal issue or widow then the farm reverts to Horace W. Lightner or his legal heirs, but in the event of Linn C. Lightner dying and leaving issue, then the two-thirds of the farm reverts to his children and the interest of one third to his widow, but if he leaves no widow then the whole of farm will belong to his children.

"And I hereby appoint Joseph Wagoner, D. B. Milliken and my son Linn C. Lightner to select and purchase the farm for my son, provided however that all three of the persons named are satisfied and agreed both as to location and price of farm."

3. That by certain decrees of the Orphans' Court of the said county and state, of dates September 14, 1886, April 13, 1887, and April 14, 1888, the said Linn C. Lightner received certain moneys amounting in all to the sum of \$700, and by certain payments made by the said guardian, Samuel R. Lightner, the full sum of \$1,000 was paid.

4. That the question is, does the \$1,000 advanced to the ward, Linn C. Lightner, by the guardian, Samuel R. Lightner, pay, in full, in accordance with the terms of the will of the said Wm. H. Lightner, or is the said Linn C. Lightner entitled to receive an additional \$1,000 upon his arriving at the age of twenty-one years, the \$1,000 already paid him being advanced under the decrees of the said court for necessities.

5. That Linn C. Lightner is entitled by said will, at the death of his father, to \$8,000, and that the same has been upon interest since his death, and at this date—nearly three years—has this fund been upon interest. No farm has ever been purchased for Linn C. Lightner, as his father's will directed and contemplated, nor have the referees named in the will of William H. Lightner either fixed location, value, or attempted so to do, of a farm for said Linn C. Lightner.

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6. If your honorable court find that he, the said Linn C. Lightner, is entitled to receive the additional \$1,000, then judgment for the plaintiff; if otherwise, judgment to be entered for the defendant; the costs to follow the judgment and either party reserving the right to sue out a writ of error therein, without oath or bail.

The will of the testator contained also the following provisions:

"I will and bequeath to my son Horace W. Lightner one thousand dollars (\$1,000) on account of work done and attention to me during my illness."

[Here followed the provisions quoted in the case stated.]

"It is my desire that my son Horace W. Lightner receive his portion of this bequest when he arrives at the age of twenty one years."

* * * * *

"Further it is my desire that in case my son Horace W. Lightner should die before arriving at the age of twenty-one years, that his share of my estate be invested in real estate in the same manner and by the same persons for my son Linn C. Lightner, he having just the same interest in it and receiving the same benefits from it that he does from his own share, but no power to sell or convey the same."

On March 29, 1889, the court, BARNETT, P. J., filed an opinion, which after stating the facts agreed upon, proceeded:

Under this statement of facts it will be observed that no provision is made in the will for the support and education of Linn C. Lightner during his minority; also, that no question is raised as to the propriety of the decrees made by the Orphans' Court, but on the contrary the fact as stated is, that the \$1,000 were "advanced under the decrees of said court for necessities." We are of opinion, therefore, that the case falls within the provisions of § 13, act of March 26, 1832, P. L. 193: "When any one shall die, leaving an infant child or children, without having made an adequate provision for the support and education of such child or children, during their minority, the Orphans' Court may direct a suitable periodical allowance, out of the minor's estate, for the support and educa-

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tion of such minor, according to the circumstances of each case ; which order may, from time to time, be varied by the court, according to the age of the minor and circumstances of the case."

Upon reference to the will itself, it appears the testator having given a legacy of \$1,000 to his son Horace W. Lightner, then further provides: "It is my will that all the balance of my property be divided equally between my two sons Linn C. Lightner and Horace W. Lightner in the following manner;" and then follows the provision copied into the case stated. There is here a separate and antecedent gift, which is independent of the directions as to time of payment, and therefore the legacy of \$1,000 to Linn C. Lightner is a vested legacy: Seibert's App., 13 Pa. 503; Bowman's App., 34 Pa. 19. But whether the legacy be vested or contingent, the legatee, by virtue of said act of assembly, may have an allowance, at least out of the interest, for his support and education: Seibert's App., 19 Pa. 49; Seitz's App., 87 Pa. 159. We are not aware that it has been decided that such allowance may not be made out of the corpus of the legacy. That question was left undecided in Leiby's App., 49 Pa. 186.

As to the remainder of Linn C. Lightner's share, directed by the testator to be invested in a farm, the intention being clear to give only the usufruct of the investment to said legatee for life, and after his death the investment or the farm purchased therewith, to his heirs mentioned, Linn C. Lightner has no absolute right of property in the corpus of the fund to be invested; this was otherwise disposed of by the testator: Bentley v. Kauffman, 86 Pa. 99. But he had an absolute right of property in the vested legacy.

Furthermore, it would appear from the will (which was presented with the case stated) that Linn C. Lightner was not intended to come into the enjoyment of either the absolute legacy, or the farm, until he had attained the age of twenty-one years. The provision respecting Horace is, "It is my desire that my son Horace W. Lightner receive his portion of this bequest when he arrives at the age of twenty-one years." In respect to Linn C. Lightner it is, "I desire that my son Linn C. Lightner receive \$1,000 as soon as he arrives at the age of twenty-one years, and that the remainder of his share be in-

Opinion of the Court.

vested in a farm." That remainder would be the residue of his share of the estate, principal and interest, after deducting the one thousand dollars ; or, in other words, the whole of Linn C. Lightner's share of the estate, with its accumulated interest at the time he attains his majority, is to be invested in a farm, excepting only the legacy of one thousand dollars. If now we give said legatee "an additional \$1,000 upon his arriving at the age of 21 years," it can only be done by taking from the remaindermen property to which they have an absolute right, and, in violation of that right and the manifest intention of the testator, bestowing it upon one absolutely who is entitled only to a life interest. This we think cannot be done. If the legatee has been advanced the corpus of his own estate, no wrong at least has been done to any other person ; but if it now be paid from the corpus of another's estate, the remaindermen would have just cause of complaint.

Being of opinion that the said Linn C. Lightner is not entitled to receive the additional \$1,000, we therefore, in accordance with the terms of the case stated, now, this March 29, 1889, enter judgment for the defendant.

Judgment having been entered the plaintiff took this writ, alleging that the court erred in entering judgment for the defendant.

Mr. B. F. Junkin, for the plaintiff in error.

Mr. W. H. Sponsler (with him *Mr. E. R. Sponsler*), for the defendant in error.

OPINION, MR. JUSTICE MITCHELL :

The scheme of the will in controversy is plain and simple. It gives the testator's son Horace a legacy of one thousand dollars, and divides all the residue of his estate equally between his sons Horace and Linn. Horace's share is given absolutely to be paid to him on arrival at the age of twenty-one, with a conditional devise over in case of death before that time. Linn's share is given in the following words: "I desire that my son Linn C. Lightner receive one thousand dollars as soon as he arrives at the age of twenty-one years, and that the re-

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mainder of his share be invested in a farm, he the said Linn C. Lightner having full control and management of farm, and receiving all revenues and proceeds therefrom, but not having power to sell," etc., with remainder to his issue, and in default of issue, devise over to Horace or his heirs. The testator intended that on coming of age his son Linn should have a cash sum of one thousand dollars put in his hands to start with. The gift for that purpose is absolute, and no provision is made for reduction or abatement. If his whole share had amounted only to that sum, on reaching the stipulated age it would all have been payable to him without regard to the consequent failure of the provision for a farm. So long as that amount remained, it became his absolutely and presently, and the court has no authority to say that it shall be reduced by sums paid previously and for a different purpose. To do so is to substitute a new will for that which the testator made. We are therefore clearly of opinion that there must be judgment for the plaintiff.

The learned court below was largely influenced by the consideration that plaintiff had but a limited interest in the money to be invested in the farm, and an absolute property only in the legacy of one thousand dollars, and that the sums paid for his maintenance during minority should therefore come out of this latter fund. Such a result might have followed had it become necessary to use up the fund for maintenance during minority, but it could not do so until all the rest of the share had been exhausted. As already said the specific gift of the one thousand dollars was the primary and controlling intent of the testator, and must be carried out so long as any portion of the share remains to pay it with. It is only the remainder after payment of this sum that is directed to be invested in a farm.

Nor do we find any difficulty in regard to the income. The gift of the shares themselves is not by way of remainder, or of a future contingent estate, but is, in terms, absolute, present, and immediate—"it is my will that all the balance of my property be divided equally between my two sons in the following manner,"—and then follows the provision for his son Linn already quoted. In the case of Horace there is a subsequent devise over in the event of his death before reaching the age of twenty-one, but in the case of Linn there is no contin-

Syllabus.

gency of any kind between him and his life estate. It is postponed as to full enjoyment, till majority, but the gift itself is of a present and absolute interest for life in the fund, vesting at once upon the death of the testator, and there is neither gift over of the income, nor direction to accumulate during minority. If the devise had been of real estate, the title would have passed by the will directly and immediately to Linn for life. As it was of personalty his interest is equally direct and immediate. The title being in him, the income followed the title, and was his absolute property both before and after majority. During minority of course it was applicable to his maintenance under the direction of his guardian or of the Orphans' Court. If there are any accumulations they are payable to him on coming of age, in addition to the thousand dollars of the corpus of the fund, given him specifically by the will.

Judgment reversed, and now judgment for plaintiff on the case stated for \$1,000.

APPEAL OF DAVID MUMMA ET AL.

[ESTATE OF PATRICK EVERS, DECEASED.]

FROM THE DECREE OF THE ORPHANS' COURT OF JUNIATA COUNTY.

Argued May 29, 1889—Decided June 28, 1889.

[To be reported.]

1. The administrator of an insolvent decedent has the right to collect and administer the assets of the estate, and neither creditors nor heirs can be heard to object to credits taken in an account for incident and necessary expenses, except on the ground that the credits are excessive.
2. An agreement in good faith by an administrator of an insolvent decedent to allow to an attorney a contingent collection fee of 50 per cent, is not necessarily invalid as against decedent's creditors; they can object to it only if unreasonable and in fraud of their rights.
3. Whether, under § 33, act of June 13, 1836, P. L. 548, a poor district which has supported a poor person, can maintain a claim in the Orphans' Court for reimbursement out of choses in action falling due after his death and collected by his administrator, not decided.

Statement of Facts.

Before PAXSON, C. J., STERRETT, GREEN, WILLIAMS and MITCHELL, JJ.

No. 58 July Term 1889, Sup. Ct.; court below, number and term not given.

On May 10, 1888, John C. Nissley, administrator of Patrick Evers, deceased, presented an account of his administration. To this account certain exceptions were filed, whereupon *Mr. F. M. M. Pennell* was appointed auditor to hear and determine said exceptions and to report distribution.

At the hearing before the auditor the following facts were made to appear:

Patrick Evers died in 1882. From 1870 until his death he was a pauper and a charge upon the borough of Mifflintown. During this period he was induced by certain persons to take out several policies of insurance upon his life, some of which were made payable to "Patrick Evers, his heirs or assigns," and others to "Patrick Evers, his representatives or assigns." These persons, who had no insurable interest in his life, paid all the expenses and premiums, took from Evers assignments of the policies, and after his death collected on them from the insuring companies considerable sums of money.

In 1886 an agreement was entered into between the heirs of Patrick Evers and Mr. David Mumma, to the effect that the firm of Mumma & Shopp, attorneys at law, of which he was the senior member, should raise an administration in the estate of Evers, collect the insurance moneys from the persons who had received them from the insurance companies, pay all the costs of collection, and receive as a compensation one half of whatever they might collect; if nothing should be recovered, the heirs to be under no liability for fees or expenses. In pursuance of this agreement, on September 9, 1886, John C. Nissley, at the suggestion of Mr. Mumma, took out letters of administration upon the estate of Patrick Evers. Mr. Nissley, as administrator, ratified the contract previously made by the heirs with Mr. Mumma, who, acting under this contract, succeeded in collecting from different persons sums aggregating \$1,031.88. Of this amount Mr. Mumma paid over to the administrator the sum of \$516, retaining, as the compensation provided for in his contract with the heirs and administrator, the remaining

Statement of Facts.

\$515.88, out of which were paid the costs and expenses of the collections, amounting to \$76.32.

At December Term 1886 of the Court of Common Pleas of Juniata county, the overseers of the poor of Mifflintown brought an action against the administrator under § 33, act of June 13, 1836, P. L. 548, to recover from him the fund arising from these insurance claims, to the end that it might be applied by them to reimbursing the district for the maintenance of the decedent. In this action, which was defeated, the administrator was represented by counsel, who charged and were paid \$150 for their services.

On May 10, 1888, the account of the administrator was filed. In it he charged himself with the \$516 received from Mr. Mumma, as constituting the whole estate in his hands, and took credit, inter alia, for the above mentioned \$150 paid as counsel fees, and for \$100 claimed by himself as commissions. The account as stated showed a balance for distribution of \$236.06.

To this account the overseers of Mifflintown filed exceptions, objecting, inter alia, to the allowance by the accountant to Mr. Mumma of \$515.88, the one half of the insurance moneys collected; to the accountant's failure to charge himself therewith, and to the credits claimed for said counsel fees and commissions.

Upon the foregoing facts found by him, the auditor, on December 18, 1888, filed his report, wherein he held, citing Kennedy's App., 4 Pa. 149, that under the circumstances, the nature of the estate and the time and trouble incident to its collection, the accountant should not be surcharged with the \$515.88, the sum paid to Mr. Mumma; that the credit of \$150 claimed by the accountant for attorneys' fees paid in resisting the action of the overseers of Mifflintown was not excessive and was allowable; that the allowance of \$100 to the accountant as commissions, however, was excessive, and should be reduced to \$75. The balance for distribution was thus increased to \$258.06.

The overseers of the poor of Mifflintown presented before the auditor a claim against the estate for \$2,027.70, on account of the maintenance of the decedent while he was a charge upon said borough. The auditor reported that over \$500 of this

Auditor's Report.

claim was unbarred by limitation, and upon the question of its allowance reported as follows :

It was argued against the allowance of this claim to participation in this distribution, that, in the first place, the overseers of the poor of the borough of Mifflintown had no legal standing before the auditor in the distribution of the fund. In support of this theory, *Deer Isle v. Eaton*, 12 Mass. 328; *Charlestown v. Hubbard*, 9 N. H. 196; *Stow v. Sawyer*, 3 Allen 515; *Jester v. Overseers*, 11 Pa. 540, were cited. In these cases, the court decided, that by the common law, the overseers of the poor, who had furnished relief and support to one in need of said relief and support, could not, in the absence of fraud, maintain an action against the party relieved and supported, or against his estate after his death. The relief and support thus furnished the pauper being a mere charity, no debt was created and no action could be maintained therefor. In other words, that the right of the overseers of the poor to maintain an action to recover the property of one whom they have relieved and supported, being a right given only by the act of assembly, they were bound to proceed according to that act. The auditor is of the opinion that these claimants have done so. They were not bound necessarily to bring suit in the Court of Common Pleas to recover this claim; by presenting it before your auditor they complied with the act of assembly.

Again; it was argued that this fund, now in the hands of the administrator, was no part of the estate of the decedent, Patrick Evers; that the accountant was a mere trustee for the heirs; that this was not tangible property in existence while Patrick Evers lived, but only became property by his death for his heirs; that these claimants, the overseers of the poor of the borough of Mifflintown, could not seize this property during the lifetime of the decedent, and that therefore the creditors and these claimants had no interest in its distribution, and that this fund belonged only to the heirs of the decedent. In answer to this, the auditor found that money realized on a policy of insurance upon the life of an individual, made payable to him or "his heirs," or payable to him or his "personal representatives," was personal property in the hands of his administrator for all the purposes of distribution: *Day v. In-*

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insurance Co., 111 Pa. 507; Deginther's App., 83 Pa. 339. It makes no difference in this respect, that the policies were assigned by the assured to others, who have no insurable interest in the life of the deceased. The assignments were void, and the property in these policies and the money realized thereon belonged to the assured's estate: Gilbert v. Moose, 104 Pa. 74; Grant v. Kline, 115 Pa. 618; Cooper v. Shaeffer, 20 W. N. 123; Corson's App., 113 Pa. 438, 445; Downey v. Hoffer, 110 Pa. 109; Meily v. Hershberger, 16 W. N. 186; Stoner v. Line, Administrator, 16 W. N. 187. Even where the decedent was the beneficiary in the policy on the life of another, in whose life said beneficiary had an insurable interest, if the party insured died some time after the death of the beneficiary, the Supreme Court has held that the money realized on the policy belonged to the estate of the beneficiary, and was property in the hands of that beneficiary's administrators for the purpose of distribution: Deginther's App. 83 Pa. 337.

In the matter before your auditor for consideration, the policies of insurance on the life of the decedent were payable to him or "his heirs and assigns," or to him or "his representatives and assigns." He was the beneficiary, and the money in the hands of this administrator belonged to the estate of Patrick Evers, deceased, for all purposes of distribution. The act of assembly gives the overseers of the poor of any district in which any person shall have become charged, power to sue for and recover any personal property belonging to such person, and to apply the proceeds thereof, or so much as may be necessary, to defray the expenses incurred in the support and funeral of said person. The common law must give way to the statute referred to. The claimants, the overseers of the poor of the borough of Mifflintown, are legally entitled to this fund; their claim or so much thereof as is not barred by the statute of limitations was fully proven, and there being no other legal claims against this estate, the entire fund in the hands of the accountant, less the expenses of the audit, is awarded to said overseers of the poor of the borough of Mifflintown.

To the foregoing report of the auditor both the accountant and the overseers of Mifflintown filed exceptions, which the court, BARNETT, P. J., disposed of in the following opinion:

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The accountant's 3d exception is, that: "The auditor erred in not deciding that the overseers of the poor of the borough of Mifflintown had no legal standing before the auditor in the matter of exceptions and distribution." And his 4th exception is, that: "The auditor erred in not deciding that the relief and support furnished the pauper, Patrick Evers, was a mere charity; and that no debt was created; and that no action could be maintained therefor."

These exceptions are radical, and, if well taken, determine the controversy, because the account is then satisfactory to all parties legally interested, and distribution must be made among the heirs of Patrick Evers. They are based upon the proposition that, at common law, supplies furnished to a pauper are a gratuity, for the payment of which no promise was implied. In support of this proposition, *Deer Isle v. Eaton*, 12 Mass. 338; *Kennebuckport v. Smith*, 22 Me. 445; and *Stow v. Sawyer*, 3 Allen 515, are cited as authorities. But probably the relief of the poor is rather to be considered a duty enforced by statute: 1 Bl. Com. 359. The world owes no man a living; he is in this respect his own debtor. If the poor district has been compelled to assume and pay some portion of this debt, there is no good reason why it should be denied the right to be reimbursed from his estate. Whatever may have been the common law rule, it has been superseded by statute both in Maine and Massachusetts, as well as in Pennsylvania. Our act of June 13, 1836, P. L. 548, makes it lawful "to sue for and recover any real or personal estate belonging to such person, and to sell or otherwise dispose of the personal property and to apply the proceeds, or so much thereof as may be necessary, to defray the expenses incurred in the support and funeral of such person." And, since said act makes it lawful "for the overseers of any district in which any person shall have become chargeable to sue for," etc., it is apparent that the above cited authorities are not applicable; and that said exceptions are not well taken.

The other exceptions are to the effect, that the auditor erred in reducing the accountant's compensation; in giving the fund to the overseers of the poor; and in not distributing it among the heirs of Patrick Evers.

In regard to the compensation we need only say, that the

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amount fixed by the auditor is more than five per cent of the whole amount collected, where there were but little time and trouble required in the collection. It is argued that the disposition of the fund was erroneously made, because it was derived from insurance on the life of Patrick Evers, which was only payable after his death, and no title to have it ever existed except in the legal representatives of the deceased; and that, therefore, the overseers are without any rightful claim. But the conclusion is a non sequitur. The same thing might be said with respect to the heirs, and the argument, if sound, would prove that the administrator alone is entitled to the fund. *Day v. New England Life Ins. Co.*, 111 Pa. 507, is cited to support the argument. But that case simply decides that a policy of life insurance is not the subject of an attachment execution during the life of the assured; but it does not decide that the fund is not assets in the administrator's hands for the payment of all his debts, or that it does not "immediately and necessarily enure to the benefit of all who are interested in the decedent's estate, whether as creditors or distributees." No question was raised here, nor can be raised now, as to the original right to sue for and recover the fund from those liable upon the death of the assured; the fund has been recovered, and the question now is one of distribution. But the case of *Jester v. Overseers*, 11 Pa. 540, is not without importance, because it decides that the overseers, who had fed and clothed the pauper and not his heirs, were next in interest to the pauper.

The said act of June 13, 1836, P. L. 548, makes it lawful for the overseers "to sue for and recover any real or personal estate belonging to such" pauper. The policy of insurance was a chose in action and personal estate belonging to the pauper. The fact that no recovery could be had on it until after his death did not change its character. A promissory note may not mature until after the payee's death; indeed, it may not be payable until a certain time after his death: *Colehan v. Cook*, Willes 393; s. c. 2 Stra. 1217; *De Wald's Estate*, 13 Phila. 251; but it is none the less, for that reason, personal estate of the payee. The statute intends that the overseers shall be reimbursed their expenses, in the pauper's behalf, from the pauper's estate, and should receive a construction consistent with that intention. We are of opinion that the accountant's exceptions should be overruled.²

Opinion of Court below.

The first exception filed by the overseers to the administrator's account is, that the administrator has not charged himself with all the moneys collected, and that the auditor erred in overruling said exception. The testimony taken before the auditor shows that there was collected the sum of \$1,081.88. This was money that belonged to the estate of Patrick Evers, and his administrator should have charged himself with it. This exception is sustained.¹⁰

The fourth exception to the administration account is, that the administrator could not allow for collection fee, one half of the fund collected; the heirs had no power to bind the estate by such agreement to the detriment of creditors; and the fourth exception to the auditor's report is, that he overruled that exception. We think this exception is well taken.¹² We are of opinion that the heirs are entitled to no part of this estate. The overseers are next in interest to the pauper: *Jester v. Overseers*, 11 Pa. 540. Their rightful claim exceeds the whole amount of the estate; there is no balance remaining to be paid over; and therefore nothing payable to the heirs. Their agreement should not therefore deprive creditors of their legal claims. The administrator's counsel should receive reasonable compensation for services properly rendered; but nothing more. *Kennedy's Appeal*, 4 Pa. 149, cited by the auditor, was decided on its own peculiar facts and is not authority where the facts are different; we think they are materially different in the case under consideration. There was but little trouble in collecting the estate; it belonged, when collected at least, if not before, to the overseers of the poor, who were not bound by an agreement to which they were not a party: *Chester Co. v. Barber*, 97 Pa. 455.

The claim of the overseers does not appear to be included in any of the actions mentioned in the statute of limitations, and it is based upon the said act of 1836; but we think it unnecessary to decide whether the bar of the statute would apply to any part of their claim, because it does not appear that such objection was raised. It was resisted on the ground that they never had any claim on the fund, and not on the ground that the remedy was impaired. We need not further discuss the exceptions.

Arguments.

The court thereupon restated the account in accordance with the principles laid down in the foregoing opinion, charging the accountant with the whole of the \$1,031.88 collected; allowing a credit of \$100 for the services rendered under the agreement with Mr. Mumma and further credits aggregating \$76.32 for the expenses connected therewith; allowing a credit of \$75 for commissions of accountant; reducing the credit for fees of administrator's counsel from \$150 to \$100,¹¹ letting the other credits taken in the account stand; and adjudged that there was in the hands of the accountant, after deducting costs of audit, a net balance for distribution of \$591.28, and decreed that this sum be paid to the overseers of the poor of Mifflintown.¹

David Mumma and the accountant, John C. Nissley, thereupon appealed to this court, assigning for error, inter alia:

1. The decree directing payment of the balance for distribution to the overseers of the poor.¹

2. The overruling of accountant's exception to the reduction of his commissions.²

10. Sustaining the first exception to the administrator's account.¹⁰

11. Reducing the credit for counsel fees to \$100.¹¹

12. Sustaining the fourth exception to the administrator's account.¹²

Mr. B. F. Junkin and Mr. Alfred Patterson (with them Mr. J. Howard Neely), for appellants:

1. At common law the overseers of Mifflintown could not be creditors of decedent for money paid on his account as a pauper: *Deer Isle v. Eaton*, 12 Mass. 328; *Charlestown v. Hubbard*, 9 N. H. 196; *Stow v. Sawyer*, 3 Allen 513. Is there a statute making them creditors? The only statute is § 33, act of June 13, 1836, P. L. 548, the full force of which is that the overseers are simply sequestrators to apply the pauper's personal property and the income of his real estate to his maintenance and burial. They may sue others for its recovery, but not him as for a debt. Not being creditors, they cannot prove a claim in the Orphans' Court against his estate. If they had any right to the insurance money, their remedy would have been against the assignees of the policies; here,

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they can claim if at all only as creditors: Overseers of White Deer Tp.'s App., 95 Pa. 191.

2. The court was cruelly severe in cutting down the amount allowed for Mr. Mumma's fee. The fee was contingent; was fixed by agreement with the heirs, ratified by the administrator, and the actual outlay exceeded the \$100 allowed. The overseers had slept for nearly five years without taking steps to recover the money, and, had it not been for Mr. Mumma's diligence, not a dollar would have been realized. Both the administrator and counsel in the action labored faithfully to protect this fund, and the cutting down of the former's commissions from \$100 to \$75, and the allowance of the latter from \$150 to \$100, were unjust. All authority teaches that you must not muzzle the ox that treads out the corn. Moreover if these overseers have no standing as creditors, all their exceptions to the account and auditor's report fall.

Mr. Jeremiah Lyons, for appellee:

1. The fees and commissions, as allowed by the court, amount to 32 per cent of the whole fund. The appellants claim together over 75 per cent. No court of equity can sanction such rapacity. The agreement with Mr. Mumma was champertous and not binding. The heirs could not bind creditors by it, and as to the administrator it was *ultra vires*: *Chester Co. v. Barber*, 97 Pa. 455. The amount allowed the administrator was almost 15 per cent of what he charged himself with in his account. The counsel fee allowed by the judge, who was as familiar with the case as the auditor, was liberal.

2. The heirs of Patrick Evers have not appealed, and no question is presented as to the right of the overseers to the fund. But they are entitled to it under § 33, act of June 13, 1836, P. L. 548. Although there may be no implied assumption on the part of the pauper for maintenance at common law, the statute clearly gives the overseers the right to reimburse the district out of his property, including choses in action, though these may not fall due until after his death. The statute is remedial and should be liberally construed.

OPINION, MR. CHIEF JUSTICE PAXSON:

We can only consider in this case the questions affecting the

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parties who have entered an appeal. Said parties are David Mumma, whose claim to retain one half the fund collected from the different life policies was disallowed by the court below, and the administrator of Patrick Evers, the deceased pauper, whose commissions have been reduced, as well as the amount expended for counsel fees. The heirs of Patrick Evers have not appealed, hence the relative rights of said heirs and the overseers of the poor of the borough of Mifflintown are not before us. We are, therefore, spared the discussion of this interesting subject.

The main question is whether Mr. Mumma was entitled to retain one half the sum collected by him. It appears from the report of the auditor that Patrick Evers, the decedent, was, at the time of his death, and had been for several years prior thereto, a pauper and a charge upon the borough of Mifflintown. It further appeared that during his life he was induced by certain parties to take out life policies in certain speculative insurance companies. These persons paid all expenses, took assignments of the policies, maintained them, and after his death drew money thereon, and kept it as their own. After the decisions of this court in other cases that such insurances enure to the benefit of the estate of the assured, an agreement was made between the heirs of said Patrick Evers and David Mumma, of Harrisburg, that said Mumma was to raise up an administration upon the estate, ascertain what policies existed on his life, who held them, to whom money had been paid thereon; collect by suit or otherwise the money so paid by the insurance companies to the policy holders; bear all expenses and pay all charges out of his own pocket, if no money was obtained; and if any money was recovered the said Mumma was to receive as his compensation one half of the gross amount so obtained. In pursuance of this agreement letters of administration were taken out upon the estate, and the administrator ratified the agreement before made by the heirs. Mr. Mumma succeeded in collecting the sum of \$1,031, one half of which he paid to the administrator, and retained the other half under the agreement as his compensation.

Up to this time no one had knowledge of a claim on the part of the overseers of the poor for the maintenance of the pauper. The overseers made no effort to collect this money from the

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parties who had received it, and the auditor distinctly finds that had there been no such agreement with Mr. Mumma there would have been no estate to distribute. The auditor further finds, and in this he is sustained by the evidence, that 50 per cent was the usual charge of attorneys for this class of cases. It must not be overlooked that the fee was contingent; no recovery, no compensation, and the expenses to be borne by the attorney. When we look at the character and amount of the claims, we are not prepared to say that the charge was unreasonable or the agreement *ultra vires*. We are not discussing a question of professional ethics, but an agreement as to professional compensation. The said agreement was not necessarily invalid because made by the heirs. *Prima facie* they had a right to make it, subject to the rights of creditors. But the latter having made no move toward collecting the money, they cannot wholly repudiate the agreement made by the heirs in good faith by means of which the money was received. They would have a right to object if it was unreasonable and in fraud of their rights. Neither appears to be the fact in this case, and we think it was error to surcharge the accountant with any portion of the money retained by Mr. Mumma.

The auditor reduced the accountant's claim for compensation from \$100 to \$75. In this he was sustained by the court below, and we think they were both right. This question does not require discussion.

The auditor allowed a fee of \$150 to counsel for professional services. This the court reduced to \$100. The auditor found as a fact that the charge was not excessive for the services rendered. The learned judge does not give a satisfactory reason for reversing him upon this point. He does not say that the amount was excessive or that it was not fully earned. That the estate when collected belonged to the overseers of the poor, and that they were not bound by an agreement to which they were not a party, is aside from the case. The administrator had a right to collect this money and to administer the estate. Creditors are bound, as well as heirs and distributees, for expenses incident and necessary to the conduct of the business; they can only be heard to object that such charges are excessive, and this has not been shown in this case. We are

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of opinion that the fee of \$150 to counsel should have been allowed.

The decree is reversed at the costs of the appellees, and it is ordered that distribution be made in accordance with this opinion.

R. P. COCHRAN v. T. P. COCHRAN.

ERROR TO THE COURT OF COMMON PLEAS OF PERRY
COUNTY.

Argued May 29, 1889—Decided June 28, 1889.

1. A devise in the following form: "I give, devise and bequeath to my son T. my farm and if he should die leaving no lawful heirs, the whole to descend to his brothers and sisters, share and share alike, or to their legal representatives," read in connection with other portions of the will, gave an estate-tail to the devisee.
2. Such an estate, devised by a will becoming operative prior to the act of April 27, 1855, P. L. 368, may be barred by deed duly executed, acknowledged and recorded, in accordance with the provisions of the act of January 16, 1799, 3 Sm. L. 338.

Before PAXSON, C. J., GREEN, WILLIAMS and MITCHELL, JJ.
No. 59 July Term 1889, Sup. Ct.; court below, No. 5 August Term 1889, C. P.

On April 13, 1889, a case stated was submitted, in which Robert P. Cochran was plaintiff and Thomas P. Cochran, defendant.

The facts are fully set forth in the following opinion of the court, BARNETT, P. J., filed April 29, 1889.

The material facts appearing from the case stated are as follows:

Thomas Cochran, who died prior to February 19, 1846, executed his will on May 2, 1838, and made the following bequests and devises:

1. He gives to his wife his dwelling house and certain lots

127 486
155 631
127 486
169 88
127 486
175 498

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of ground in Millerstown, and all the household and kitchen furniture during her natural life; likewise the net income of two hundred shares of bank stock, "the interest of which she is to draw during her natural life, and at her death it is to descend as hereinafter bequeathed and devised." The furniture is to be at her disposal "among my children and none else," and if not disposed of by her, "my will is it shall descend to my children who may survive her, share and share alike."

2. He gives and devises to his son William P. Cochran two hundred shares of bank stock "for his own use and benefit and to dispose of the same as his judgment may direct;" "also all my Missouri lands, in like manner, for his own use."

3. He devises certain tracts of land in this county to his son James M. Cochran, the net interest and income of which "he shall draw and inherit during his natural life, and at his death to descend to his lawful children, and if he should leave none, in that case to descend to his brothers and sisters."

4. "I do give, bequeath and devise to my son Thomas Preston Cochran my farm in Pfoutz's Valley, with all its buildings and improvements, containing 152 acres, more or less; also the hill tract bought at sheriff's sale, as the property of Daniel Huffman, deceased, containing about 200 acres more or less, with all the improvements thereon; also my dwelling house in Millerstown at the death of his mother, it being on the east side of the main street, and the four lots attached to the same on the east side of the main street, in said Millerstown, Perry county; and if he should die, leaving no lawful heirs, the whole to descend to his brothers and sisters, share and share alike, or to their legal representatives."

5. He devises to his daughter Eliza Jane McDowell two hundred acres of his Franklin county farm, "for her use and benefit; should she die leaving no lawful issue, then to descend to her brothers and sisters, share and share alike."

6. He devises the remaining 204 acres of his Franklin county farm, to his daughter Mary Ann Thompson, "to enjoy and possess all the rents, issues and profits of the same, on her part, during her natural life, and at her death to descend to her lawful children and if she should leave none, to descend to her brothers and sisters equally."

7. He gives to his grandson Thomas Cochran \$100, to be

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paid when he arrives at the age of twenty-one years, if promising and of good conduct; if not, to be put at interest for his use: "in case he should die leaving no lawful issue, then it shall descend to his uncles and aunts, or their representatives by his father's side."

8. He gives to his grandson Allison Cochran one dollar.

9. He directs the residue of his real and personal estate to be converted into money; and what remains after payment of a mortgage against his Franklin county farm, including the bank stock bequeathed to his wife if undisposed of by her, and twelve shares of other bank stock, is to be equally divided among his surviving children; "it is understood that the remainder as above stated to go among my children who may survive me, and them only, to be equal shares of the remainder of my estate."

10. "I do give and bequeath my small library to and among my children who may survive me, share and share alike; also my wearing apparel."

He declares that if any of his heirs or legatees shall attempt to invalidate or make void any part of his will, such heir or legatee shall be debarred of any share of his estate. And lastly he appoints his wife, Abram Adams, Esq., and Thomas P. Cochran his executors.

Thomas P. Cochran sold and conveyed, by deed dated March 1, 1887, to his son Robert P. Cochran, certain of the real estate so devised to him in the fourth item of said will, and received the vendee's judgment note of \$3,500 for balance of purchase money, and entered judgment thereon to No. 169 January Term 1888. On March 25, 1887, in the belief that his interest in the lands devised to him and conveyed to Robert P. Cochran was an estate-tail, Thomas P. Cochran proceeded in due form of law to bar the entailment. But the plaintiff, alleging that the estate of Thomas P. Cochran in the land so devised to him was not a fee simple, nor such as can be made a fee simple by barring entailment, and because there are other children of said Thomas P. Cochran, refuses to pay the amount of said judgment note, given in payment for a fee simple title. It is admitted also that at the time Thomas Cochran executed his will, he had five children living, all of whom were then married and had children.

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Under these facts the question for decision is, what estate did Thomas P. Cochran take in the land devised to him in the will of his father? If not an estate in fee simple, or such that the defendant can reduce to a fee simple, then judgment No. 169 January T. 1888, to be opened and the defendant therein let into a defence, as upon petition and rule for that purpose; but if such estate, then judgment to be entered for the defendant in this suit; with the right to either party to sue out a writ of error.

It will be observed that in the provision of the will against an attempt to invalidate any part of it, there is no devise over in case of a violation of such provision; and that it is to be considered, therefore, only in terrorem, and without effect upon estates already vested: Chews' App., 45 Pa. 228, recognized in Van Dyke's App. 60 Pa., 491. That provision in no way affects the question to be decided.

The fourth item of this will was before us for construction, in Thomas P. Cochran v. Ezra P. Titzell, No. 7, April Term, 1887; and the question was then, as it is now, what estate Thomas P. Cochran took under the said devise in his father's will. This court decided that he took an estate-tail, and the Supreme Court affirmed the judgment. The question, thus, is *res adjudicata*, unless there are different facts now presented, calling for a different judgment. This is alleged to be the case. Only the fourth item was then submitted; the entire will is now presented to the court. The additional facts, therefore, consist in the other items of the will. The plaintiff contends that the fourth item is so modified by the other items, that, read in the light of the whole will, a different case is presented, requiring a different determination; that, considered by itself and unexplained by the context, the phrase, "and if he should die leaving no lawful heirs," may well mean a general indefinite failure of issue; but viewed in connection with the other items, imports a failure at the first taker's death; and that therefore Thomas Preston Cochran did not take an estate-tail.

This will was made since the act of April 8, 1833, P. L. 249; it required no words of inheritance or of perpetuity to pass the whole estate of the testator in the premises devised. The devise to William P. Cochran, in the second item, of the testa-

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tor's Missouri lands, passed the testator's whole estate therein, and vested a fee simple in the devise. The devise to James M. Cochran, in the third item, and to Mary Ann Thompson, in the sixth item, is expressly during natural life, and at their deaths respectively, to descend to their lawful children, and, if they should leave none, to descend to their brothers and sisters equally. The devise in the fourth and fifth items, to Thomas Preston Cochran and Eliza Jane McDowell, respectively, differ from the others in that they are not expressly for and during natural life, on the one hand, nor do they pass the whole estate of the testator therein to the first takers, on the other. The will is not artistic, but the testator was intelligent. He knew how to create different estates in the first takers, and has done so by an intention clearly expressed. He has given a fee simple to one, life estates to others, and at least a freehold estate to Thomas. An inference could not safely be drawn from the fact that he used the term "children" in a devise expressly for life, that he also meant children, by the terms "lawful heirs" in conferring a freehold. Even if it might be inferred that he used "issue" in the sense of "children" in the fifth item, nevertheless it would not materially aid an inference that he meant children by "lawful heirs" in the fourth item. Heirs is a word of larger import than issue: *Taylor v. Taylor*, 63 Pa. 481. "Lawful heirs" here means heirs of the body; because, since the devise over is to the brothers and sisters, they are necessarily excluded from the first takers; and since the brothers and sisters are not to take while there are heirs of the body of the first takers, the limitation over is after an indefinite failure of issue: *Covert v. Robinson*, 46 Pa. 274.

The inference that testator by "lawful heirs" meant children, could not be drawn for another reason. The devise over is to the first taker's "brothers and sisters, share and share alike, or to their legal representatives." Where there is a bequest of personalty, "legal representatives," as in *Fleck's Est.*, 1 Pars. 126, ordinarily means executors or administrators. But where there is a devise of realty, "the legal representative, in legal contemplation, is the heir, and not the administrator:" *Duncan v. Walker*, 2 Dall. 205; *Ware v. Fisher*, 2 Y. 578; *Commonwealth v. Bryan*, 6 S. & R. 81. If the testator felt

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a necessity of providing an indefinite succession for the devise over, it must have sprung from the contemplation of an indefinite failure of issue of the first taker: Stook's App., 20 Pa. 349. Certainly, it is not clear, from a consideration of the whole will, that the testator meant to give less than a freehold estate to his son Thomas; certainly, there is nothing "to contradict unequivocally the presumed intention that the devise over shall not take effect until the whole line of issue is extinct," and that is all that is required in order to give the same construction to the fourth item which it received when the case of Cochran v. Titzell was under consideration.

"It is a rule of law," said Mr. Justice SHARSWOOD, in Kleppner v. Laverty, 70 Pa. 70, "which declares inexorably that where the ancestor takes a preceding freehold, by the same instrument, whether deed or will, a remainder shall not be limited to his heirs as purchasers." We are of opinion that this case is ruled by Eichelberger v. Barnitz, 9 W. 447, and the line of cases which follow its lead. These cases are numerous; some of them are the following: Smith's App., 23 Pa. 9; Braden v. Cannon, 24 Pa. 168; Covert v. Robinson, 46 Pa. 274; Matlack v. Roberts, 54 Pa. 148; Kleppner v. Laverty, 70 Pa. 70; Lawrence v. Lawrence, 105 Pa. 335; Carroll v. Burns, 108 Pa. 386; Bassett v. Hawk, 118 Pa. 94; Cockins's App., 111 Pa. 26; Reinoehl v. Shirk, 119 Pa. 108. To which may be added Titzell v. Cochran, 8 Cent. R. 513.

And now, April 29, 1889, being of opinion that the estate devised to the defendant was, by reason of said devise and the proceedings to bar entailment, an estate in fee simple, we hereby, in accordance with the terms of the case stated, enter judgment for the defendant.

The plaintiff thereupon took this writ, assigning for error the entry of judgment in favor of the defendant, under the facts contained in the case stated.

Mr. W. H. Sponsler (with him *Mr. Jeremiah Lyons* and *Mr. J. L. M. Markel*), for the plaintiff in error.

Mr. B. F. Junkin (with him *Mr. W. A. Sponsler*), for the defendant in error.

Syllabus.

PER CURIAM:

The fourth item or clause in the will of Thomas Cochran was before us for construction in *Titzell v. Cochran*, 8 Cent. R. 513, and we then decided that Thomas P. Cochran took a fee-tail. The whole of the will was not before us in that case; the fourth item only was considered. We have now the entire will, and it is contended that when the fourth item is read in connection with the other portions of said will, it should receive a different construction. A careful consideration of the subject leads us to a different conclusion, and we adhere to the views formerly expressed. The opinion of the learned judge below is so full and accurate that we are spared a further discussion of the case.

Judgment affirmed.

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216	256

APPEAL OF WM. R. POMEROY ET AL.

[ESTATE OF JOSEPH POMEROY, DECEASED.]

FROM THE DECREE OF THE ORPHANS' COURT OF JUNIATA COUNTY.

Argued May 29, 1889—Decided June 28, 1889.

[To be reported.]

1. An award by the Orphans' Court to a creditor of a decedent, of the amount of his claim out of funds adjudged to be in the hands of an executor, is not the equivalent in law of actual payment of the claim.
2. If such creditor, by reason of the executor's insolvency, fails to receive payment of the sum awarded him, he is entitled to come in upon a second fund raised in the same estate for a pro rata share thereof.
3. An order, pending exceptions to an auditor's report, directing payment of an award to a creditor unaffected by them, is a matter within the discretion of the court, and the creditor's omission to apply for such order is not laches.

Before PAXSON, C. J., STERRETT, GREEN, WILLIAMS and MITCHELL, JJ.

No. 74 July Term 1889, Sup. Ct.; court below, number and term not given.

Statement of Facts.

On May 10, 1888, the account of J. Howard Neely, administrator d. b. n., c. t. a. of the estate of Joseph Pomeroy, deceased, was filed, showing a balance for distribution of \$4,079.16. The said account was afterward confirmed, and on June 12, 1888, *Mr. R. McMeen* was appointed auditor to distribute the balance shown thereby to the persons entitled.

At the hearing before the auditor, Wm. R. Pomeroy and Jane E. Campbell presented certain claims for allowance, as creditors of the decedent, and in support thereof they offered as proof the report of a former auditor in the same estate and the decree of the court confirming said report. It was then made to appear that Joseph Pomeroy died September 21, 1874, having made a will by which J. Nevin Pomery was appointed his executor. The will was duly admitted to probate; the executor named therein took out letters testamentary and on August 14, 1883, filed a partial account. Exceptions filed thereto resulted finally in a decree of the Supreme Court, entered October 15, 1885, ascertaining the balance in the executor's hands to be something over \$58,000. The account was then referred to *Mr. Jeremiah Lyons*, as auditor, to make distribution of this balance.

Before Mr. Lyons, auditor, Wm. R. Pomeroy and Jane E. Campbell, presented their respective claims as creditors of the decedent, and in his report, which was filed February 1, 1886, the auditor allowed the claims and, on account thereof, awarded out of the fund to William R. Pomeroy the sum of \$13,836.15, and to Jane E. Campbell the sum of \$284.80. The confirmation of the report was delayed by exceptions and applications respecting matters other than these two claims, until February 9, 1888, when the court made a final decree confirming it and directing that payment be made in accordance with the distribution reported. In the meantime, however, the executor became insolvent and had been discharged, when J. Howard Neely was appointed administrator d. b. n., c. t. a.

With respect to the claims presented by Wm. R. Pomeroy, Jane E. Campbell, and others in like circumstance, before Mr. McMeen, as auditor to distribute the balance shown by the account of J. Howard Neely, administrator, etc., Mr. McMeen reported in substance, as follows: That the claims then made by said claimants were allowed by the former report of Mr. Lyons

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and liquidated by him at the sums now respectively claimed by them; that J. Nevin Pomeroy, the executor, became insolvent about April 16, 1886, soon after the report of Mr. Lyons was filed, and remained insolvent; that neither of said claims had been paid by the executor, as allowed and awarded, by reason of the insolvency of said executor; that no demand for payment of either of said claims, as allowed and awarded, had been made by the claimants upon said executor. Upon these facts, and the further fact found by the auditor, that the estate of Joseph Pomeroy was then insolvent, the auditor allowed the foregoing claims to participate in the fund and awarded to them a pro rata share thereof with other creditors, as follows: To William R. Pomeroy, \$2,578.28, and to Jane E. Campbell, \$35.74, and made report accordingly.

To said report, certain creditors and persons interested filed exceptions, alleging that the auditor erred, inter alia, as follows:

1. In not finding as facts, that no exceptions were filed to that part of the auditor's report distributing the balance in the hands of J. Nevin Pomeroy, executor, which awarded and decreed to be paid to Wm. R. Pomeroy, \$13,836.15, and to Jane E. Campbell, 284.80, which said auditor's report was filed February 1, 1886; and that during the time from February 1, 1886, to April 16, 1886, J. Nevin Pomeroy was not insolvent, and these claimants lost their money through their own supineness and neglect.³

6. In awarding any part of the money now for distribution to Wm. R. Pomeroy and Jane E. Campbell, who were concluded by the former decree of the court.⁶

Said exceptions having been argued, the court, BARNETT, P. J., on March 19, 1889, filed the following opinion and decree:

We think the exceptions to the schedule of distribution reported by the auditor must be sustained. When a sheriff, by virtue of an execution, converts the defendant's property into money and fails to pay creditors in accordance with a decree of distribution, the defendant is discharged from liability for the fund in the sheriff's hands, and the creditors' remedy is against the sheriff. This is a proceeding, it is true, in a common law court. But equity follows the law. When letters testamentary are granted to an executor, and assets come to

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his hands, his accounts are subject to the jurisdiction of the Orphans' Court, and distribution is made in accordance with its decrees. The executor is, to that extent, a quasi officer of that court, whose duty it is, like a sheriff, to satisfy the claims of the distributees. If he fails to do so, they at least have a remedy against him. If he has been discharged, and further assets of the estate come to the hands of an administrator de bonis non, it would not be equity to take these latter funds from creditors who were not included in the former distribution, and appropriate them to former distributees to whom payment had been decreed in full. That would be to take the funds of an estate to make good the default of the executor, at the expense of the latter class of creditors, and leave them without remedy against the executor. It would be to give two chances to the first class of creditors to recover payment, and deny the whole of one to the latter.

As between these two classes of creditors, we think the former decree of distribution was conclusive; *Kittera's Est.*, 17 Pa. 416; *Sergeant v. Ewing*, 30 Pa. 75. In a bankruptcy proceeding, where a dividend was declared and advertised to be paid, and, subsequently to the appointed day for payment, the bankers to the commission in whose hands a sum more than sufficient for the payment of the dividend had been left by the assignees, stopped payment and afterwards became bankrupt, it was held that an order of dividend is to be considered as a separation from the bulk of the estate of the sum to be divided, and that the unpaid dividends were lying in the hands of the bankers at the risk of the creditors who had neglected to apply for payment: 1 Mont. & MacA. 283, cited in *Hilliard on Bankruptcy*, 216, § 37. We are of opinion that the amount found due by the executor on the confirmation of his account was a separation of that sum from the bulk of the testator's estate, and when the distribution made by the auditor of the sum so separated was confirmed by the court, the several sums so found due and appropriated to the distributees, remained in the executor's hands at their risk. We therefore refer the matter back to the auditor, to distribute the fund in the hands of the administrator de bonis non, among those entitled, who did not have an appropriation made to them in full of their respective claims by the former auditor.¹

Arguments.

The auditor thereupon made a supplemental report by which a part of the fund for distribution was awarded to creditors other than the claimants and the remainder to the residuary legatees of the testator, to which report the claimants filed exceptions, alleging that the auditor erred:

1. In excluding Wm. R. Pomeroy and Jane E. Campbell, who were shown to be creditors by a former report of auditor Lyons and the decree of the Orphans' Court from the fund.⁸

2. In deciding, that, notwithstanding that J. Nevin Pomeroy, the executor, was insolvent at the time of the filing of said auditor Lyons' report, and continues so to this time, and was insolvent when his report was confirmed and the money decreed by the Orphans' Court, the said decree was payment in law, and debarred them from participating in the fund now under distribution.⁹

The court on May 2, 1889, dismissed these exceptions and confirmed the supplemental report of the auditor.¹¹

William R. Pomeroy and Jane E. Campbell thereupon took this appeal, specifying that the court erred:

1. In the decree setting aside the first report of the auditor.¹

3, 6. In sustaining the exceptions to said report.^{3 6}

8, 9. In dismissing the exceptions to the supplemental report.^{8 9}

11. In confirming the supplemental report.¹¹

Mr. B. F. Junkin and *Mr. A. J. Patterson* (with them *Mr. J. Howard Neely*), for the appellants:

1. The ruling of the court below that a decree awarding payment to a creditor out of money in the hands of an executor, operates ipso facto as payment, although nothing is realized from the decree by reason of the executor's having squandered the assets in his hands and become insolvent prior to the adjudication, is unreasonable, and in effect is making the creditor a surety for the executor. There is no analogy between an executor, who receives assets of the decedent without the agency of the creditors, and a sheriff. *Ex parte Powell*, 1 Mont. & MacA. 283, was ruled, not on the effect of the decree per se, but on the subsequent neglect of the creditor. The circumstances were analogous to a failure to present a check with due diligence, and there is no similitude between that case and this.

Arguments.

2. The claimants are not chargeable with laches. What more could they have done than they did? It is possible, that as no exceptions were filed to the allowance of their claims by the first auditor, they might have asked for a special decree directing payment of their claims. This practice is unknown in the counties of Juniata and Perry, and to hold appellants guilty of negligence because they did not resort to it, would be a harsh and unjust ruling. Even had they done so, their earliest opportunity was on April 1, 1886, when the auditor's report was filed, and under the facts proved it is clear that the executor was insolvent for several years prior to 1886. The decree reverses the old maxim that the law helps the vigilant, by making claimants lose their claims because of having proved their debts before the appellees proved theirs.

Mr. Jeremiah Lyons, for appellees:

1. What caused the executor's insolvency? William R. Pomeroy, one of the claimants, on April 14, 1886, entered judgment against him for \$50,000, issued execution, levied on and sold all his property, and bought in all the realty and nearly all the personalty. The greater part of the property was property which the executor got by the decedent's will. Thus the estate of the testator was taken to pay the private debt of the executor to William R. Pomeroy, and he now seeks to take from the residuary legatees what was left to them, to pay his claim against the estate.

2. There is no evidence that the executor was insolvent at the time the report of the first auditor was filed, or that if they had demanded their money at any time prior to the middle of April, 1886, when according to the auditor's finding, he became insolvent, they would not have been paid. The presumption is that the executor had the money. The exceptions to the report of the first auditor in no way affected the claimants' demands, and they have no excuse for not demanding their money. A creditor neglecting to come in with his claim to a pro rata share of the assets until after an auditor's report is confirmed, is too late: *Støever's App.*, 3 W. & S. 154. On the same principle, the claimants having taken no measures to recover their money, should suffer the loss; otherwise the residuary legatees, who are without fault, will suffer hardship.

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OPINION, MR. CHIEF JUSTICE PAXSON:

This record presents the question whether creditors of an estate whose claims have been awarded them by an auditor, and confirmed by the Orphans' Court, out of the funds of an estate in the hands of the executor, but who have not received payment owing to the insolvency of said executor, are entitled to come in upon a second fund raised in the same estate, and claim a pro rata share thereof. In other words, is the award of an auditor in favor of a creditor, and a decree in his favor, actual payment? The auditor held that it was not, but he was reversed by the learned judge below, who held that the award amounted to payment so far as to exclude the creditor in whose favor it was made from participating in the second fund.

It would have been more satisfactory if some authority had been cited to sustain so novel a proposition. *Kittera's Estate*, 17 Pa. 416, and *Sergeant v. Ewing*, 30 Pa. 75, are not in point. No such question as the one before us was raised in either of those cases. *Ex parte Powell*, 1 Mont. & MacA. 283, is equally wide of the mark. That was a case arising under the English bankrupt law. The creditors were allowed to select the bank where the money was to be deposited when received by the assignee; a dividend was declared and the creditors notified to call at the bank, get their checks, and draw their money; some of the creditors neglected to do so, and in the meantime the bank failed. The distinction between that case and this can be seen at a glance. The auditor finds the fact that the executor became insolvent before the final confirmation of first auditor's report, and pending exceptions filed thereto by other parties. It is true, the appellants might have applied to the court for an order upon the executor to pay them pending the exceptions. Such order, however, would have been in the discretion of the Orphans' Court, and it is not a practice prevalent in all the counties of the state. I do not see how these appellants can be punished by the loss of their claims for this omission. The court below, however, evidently regarded the case as analogous to that of a sheriff, who has collected money on an execution, and fails or neglects to pay it over. It is true in such case the debt is discharged and the execution creditor must look to the sheriff for the money. But I am unable to see the analogy. The sheriff is the officer of the law, and has

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given security for the faithful performance of his duty. Moreover, the execution creditor having placed his execution in the hands of that officer for collection, has in a manner constituted him his agent for that purpose, and has the right to sue upon his official bond in case of default. But an executor is not an officer of the law, nor in any sense the agent of the creditor. He is appointed by the testator, and derives his authority to act from the will. The granting of letters testamentary by the register of wills is a pro forma act, to give effect to the will of the testator.

If there was any laches here, it appears to have been participated in by all parties connected with the estate, creditors, legatees, and distributees alike. Nor do I see upon what grounds other creditors, who did not present their claims until the second audit, can charge those creditors with laches who presented their claims before the first. The residuary legatees also could have pressed this estate to an earlier settlement as well as the appellants could. Any person interested in an estate can cite the executor to file his account. That the great loss to this estate is due in a great measure to the supine negligence of nearly every one interested in it, I have very little doubt, but I do not see that the appellants are entitled to a larger share of the blame, if there be any, than the others. We see no ground upon which the principle that an award is payment can be sustained. I know of no decided case which so holds, and none such has been cited in either the printed or oral argument.

The decree is reversed at the costs of the appellees, and it is ordered that distribution be made in accordance with this opinion.

D. T. PEEK ET AL. v. D. HEIM ET AL.

ERROR TO THE COURT OF COMMON PLEAS OF NORTHUMBER-
LAND COUNTY.

Argued May 29, 1889—Decided June 28, 1889.

(a) By the "terms of consignment" attached to an invoice and accepted by the consignee, it was stated that the goods consigned were the property of the consignors, were so to remain until fully paid for, and that the consignors shipped and delivered them upon the express condition that the consignee should remit a sum certain therefor, within a time certain, or return the goods.

1. The transaction, evidenced by such terms, was not a bailment but a sale to the consignee, with an agreement that the title was to remain in the consignors until the price was paid: the arrangement was valid between the parties to it, but the secret lien attempted to be created could not affect the consignee's creditors.
2. Whatever the form of the agreement, if the purpose of it is to cover up a sale and preserve a lien in the vendors for the price of the goods, it is void as respects creditors of the vendee, whether the credit is given before or after the delivery of the goods; a consignment for such an object is no better than any other device.

Before PAXSON, C. J., STERRETT, GREEN, WILLIAMS and MITCHELL, JJ.

No. 85 July Term 1889, Sup. Ct.; court below, No. 236 December Term 1888, C. P.

On November 14, 1888, a feigned issue was framed, as directed by the court, wherein David T. Peek and Geo. W. Peek, trading as Peek & Son, were plaintiffs, and D. Heim and Ira T. Clement were defendants, to determine the ownership of seven pianos levied upon by the defendants on writs of fieri facias as the property of F. K. Hill, and claimed by the plaintiffs.

At the trial on May 7, 1889, the following facts were made to appear:

In 1886 F. K. Hill and H. B. Neff were engaged in the organ manufacturing business at Sunbury, Pa., trading as Hill & Neff. The firm became insolvent, and D. Heim and Ira T.

Statement of Facts.

Clement, respectively, obtained judgments against the partners which remained unpaid out of execution sales of the partnership assets.

On December 10, 1886, Hill wrote to H. J. Raymore, the manager of defendant firm, asking to sell pianos for them, and effected an arrangement so to do. In the correspondence he stated expressly that he wished the title to remain in the defendants. On seven different occasions, beginning with February 21, 1887, and ending with January 27, 1888, the defendants shipped a piano to said Hill, the invoices being in the following form :

"CONSIGNEE'S INVOICE.

"No. C. 273.

"Memorandum of piano shipped on special consignment to F. K. Hill, of Sunbury, in the state of Pennsylvania, by Peek & Son, of New York city, and received by said F. K. Hill on the terms of shipment and delivery printed on the reverse side of this invoice."

On the reverse side of the invoice was printed the following :

"TERMS OF CONSIGNMENT.

"No. C. 273.

"The piano named and invoiced upon the memorandum of special consignment on the reverse side hereof is the property of Peek & Son, of New York city, and is to remain their property until fully paid for; and said Peek & Son ship and deliver the same upon the express condition that F. K. Hill of Sunbury, in the state of Pennsylvania, shall remit the sum of one hundred and sixty-five dollars to them therefor, within from the date hereof, or return the said piano to them at the expiration of said time, at the expense of said F. K. Hill, for freight, cartage and storage. In case a note is given, it is understood to be for accommodation, and not in payment of said piano.

"N. B. The annexed coupon to be detached and signed by consignee, upon receipt of goods, and forthwith mailed to Peek & Son, New York city."

The said annexed coupon was the following :

"CONSIGNEE'S AGREEMENT.

"C. 273.

"One F. K. Hill, of Sunbury and State of Pennsylvania,

Charge of Court below.

consignee of piano from Peek & Son, of New York city, as per consignment invoice No. C. 273. One piano, style 1 No. 10064, and I do receive the same as the property of said Peek & Son; and said piano is to remain the property of said Peek & Son till the invoice price of one hundred and sixty-five dollars is fully paid them; and I do further agree to pay to the said Peek & Son, for said piano, the sum of within from this date, or to return them the said piano in as good order and condition as when received, at the expiration of said term at my own expense for freight, cartage and storage. In case a note is given it is understood to be for accommodation, and not in payment of said piano.

"N. B. This coupon to be detached from invoice and mailed Peek & Son, New York city, duly signed, immediately upon receipt of goods invoiced."

All the invoices were the same in terms, except that in some of them the words "within," "from the date hereof" and "at the expiration of said time" were erased from the "Terms of Consignment," and the words "and I do further agree to pay to the said Peek & Son, for said piano, the sum of from this date, and at the expiration of said term," or a part of said words, were erased from the "Consignee's Agreement."

Hill continued to do business for the plaintiffs, selling and receiving pianos, until September, when Heim and Clement issued executions on their judgments and the sheriff levied on the pianos in suit. Peek & Son claimed the pianos, and under the sheriff's interpleader act this feigned issue was formed.

At the conclusion of the case on the evidence, the court, BUCHER, P. J., 20th district, holding special term, charged the jury, *inter alia*, as follows:

[Whether Mr. Hill received the pianos in dispute as the agent or factor of the plaintiffs to sell for them, or whether the transaction between him and the plaintiffs was a conditional sale, depends on the contract between the parties. We permitted the plaintiffs, under the objection of the defendants, to give in evidence the correspondence which passed between them and Mr. Hill leading to the contract, as well as the conversations had by him with one of the plaintiffs in the city of New York, prior to the delivery of these pianos to Mr. Hill.

Charge of Court below.

It is insisted by the learned counsel for the defendants that the consignee's agreement, consignment invoice and terms of consignment which accompanied each piano, the piano going by freight and the consignee's agreement, etc., going by mail, constitute the sole agreement between these parties; that all the evidence given by the plaintiffs, consisting of telegraphic dispatches, letters and the conversations had by word of mouth between Mr. Hill and one of these plaintiffs in the city of New York, prior to the shipment of the pianos in dispute, is to be disregarded in the determination of what was the real contract between the parties; that the case should be decided simply and solely upon the agreements which were sent by mail to Mr. Hill. Gentlemen of the jury, we admitted this evidence for the purpose of enabling us to get the whole case before the court, in order that we might more accurately determine and ascertain the nature of the contract between these parties. After hearing this evidence, I have reached the conclusion that the case is to turn and be decided upon the written consignments and consignee's agreements that were forwarded by the plaintiffs, at the time they shipped the pianos to Mr. Hill; that all the evidence that was admitted as introductory to the contract is to have no weight whatever in your deliberations. I therefore charge you that you are to disregard that evidence and that the case is to be determined solely upon the construction to be given to the consignee's agreements, consignment invoices and the terms of consignment, which were executed by the plaintiffs on one side and by Mr. Hill on the other, upon the receipt of these respective consignments of pianos.] ⁴

Now, then, the nearest case upon the subject that I know of is the one which I have already alluded to, the case of McCullough v. Porter, 4 W. & S. 177. . . . The court there held that under the contract the relation of factor existed between the party to whom the goods were sent and the party who sent them to him. [But in the papers before us there is no stipulation that Mr. Hill was to sell these goods as the agent or factor of Peek & Son, who shipped them to him, and in that part of it differs radically from the case of McCullough v. Porter, to which I have just alluded. It may have been the intention of the parties who concocted these consignee's agreements, consignment invoices and terms of consignment, to establish

Charge of Court below.

such a relationship between the plaintiffs and F. K. Hill, but, gentlemen of the jury, I instruct you that the agreement fails to carry out and consummate such a purpose. There is no provision or stipulation in them whereby F. K. Hill was to sell these goods as the agent or factor of these plaintiffs. But, on the other hand, it looks to me and I so charge you that these papers on their face constitute what is denominated in law a conditional sale. It was a fraud on the part of Peek & Son to sell these pianos to F. K. Hill and retain a lien upon them until they received the price named in the invoice. Such contracts are forbidden by the law, as we have already told you, and for this reason we charge you that under all the evidence you ought to find a verdict in favor of the defendants.]⁵

The plaintiffs have presented some points to me which I will answer and then I am done.

1. The evidence in this case shows that F. K. Hill, to whom Peek & Son consigned the pianos in suit, was a mere factor, who had a right as such factor to sell goods in his own name; and the evidence showing that the pianos were clearly distinguishable in Hill's hands as the property of Peek & Son, at the time of the levy, the defendants had no right to levy upon them as creditors of Hill, and the verdict of the jury must be in favor of the plaintiffs.

Answer: Refused.¹

2. The consignment agreements in this case do not constitute the whole contract between Peek & Son and F. K. Hill as to the property in dispute, but are such conditions as a consignor has a right to attach to a particular consignment to a factor, and do not in themselves change the title or ownership in the goods; the true relationship or agreement between the parties being shown by the whole course of their dealing.

Answer: Refused.²

3. That under all the evidence in the case the verdict of the jury must be for the plaintiffs.

Answer: Refused.³

The jury returned a verdict in favor of defendants, and judgment was entered thereon, when the plaintiffs took this writ, assigning as error:

1-3. The answers to plaintiffs' points.^{1 to 3}

Opinion of the Court.

4, 5. The portions of the charge embraced in []^{4 5}

Mr. Lewis Dewart, for the plaintiffs in error.

Mr. S. P. Wolverton (with him *Mr. George B. Reimensnyder*, for the defendants in error.

PER CURIAM:

This was a feigned issue under the sheriff's interpleader act. The pivotal question is, whether the property levied upon by the sheriff had been consigned to Hill, the defendant in the execution, as the factor or consignee of Peek & Son, to be sold by him on their account, or whether the transaction amounted to a conditional sale with an attempted reservation of a lien for the price. The court below took the latter view of it and instructed the jury accordingly. All of the assignments of error bear upon this point.

We see no error in the ruling of the court. The whole contract appears from the two papers, the one headed "Terms of Consignment," and signed by Peek & Son, and the other headed "Consignee's Agreement," and signed by F. K. Hill. It is true the words "consignor" and "consignee" appear sufficiently conspicuous, but these are merely labels which the parties have placed upon the transaction; we must look within to see its real nature, and it is immaterial what the parties designate it. We thus learn from the "Terms of Consignment" that the piano named and invoiced, and consigned to Hill, "is the property of Peek & Son, of New York city, and is to remain their property until fully paid for; and the said Peek & Son ship and deliver the same upon the express condition that F. K. Hill of Sunbury, in the state of Pennsylvania, shall remit the sum of one hundred and sixty-five dollars to them therefor, within . . . from the date hereof, or return the said piano to them at the expiration of the said time, at the expense of the said F. K. Hill." Then follows the "Consignee's Agreement," by which Hill acknowledges having received the piano on consignment; that it is to remain the property of Peek & Son until paid for, and if not paid for, to be returned at his own expense, etc.

That this was not an ordinary transaction between consignor

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and consignee is too plain for argument. Where goods are consigned to a factor for sale, they remain the property of the consignor and are not subject to the debts of the factor, and no ingenious contract is required to protect them from his creditors. There is nothing upon the face of the papers to indicate that Hill was to sell the pianos for the account of Peek & Son, as their factor. On the contrary it was manifestly a sale to Hill, with an agreement that the title was to remain in Peek & Son until the price was paid. The arrangement was good between the parties, but worthless as to Hill's creditors. The secret lien attempted to be created cannot affect them. It would seem almost a waste of time at this late day to cite authority for so evident a proposition. I will refer, however, to *Thompson v. Paret*, 94 Pa. 275, where it was said by our late brother TRUNKEY: "Whatever the form of the agreement, if its purpose was to cover up a sale and preserve a lien in the vendors for the price of the goods, it was void as respects creditors, whether the credit was given before or after the delivery of the goods. A consignment for such object was no better than any other device." See also *Stadtfeld v. Huntsman*, 92 Pa. 53; *Forrest v. Nelson*, 108 Pa. 481. These decisions are in harmony with a long line of cases which are familiar to the profession. What we have said covers all the assignments of error.

Judgment affirmed.

On October 14, 1889, a motion for a re-argument was refused.

Syllabus.

PETITION OF M. E. POLLARD FOR LICENSE.

CERTIORARI TO THE COURT OF QUARTER SESSIONS OF ALLEGHENY COUNTY.*

Argued May 23, 1889—Decided June 28, 1889.

[To be reported.]

1. The granting of wholesale licenses being a matter specially committed to the Courts of Quarter Sessions by the act of May 24, 1887, P. L. 194, upon a writ of certiorari the Supreme Court may review the proceedings of such courts therein, so far as to see that they have kept within the limits of the powers conferred, and have exercised them in conformity with law.
2. The provision of the act of May 24, 1887, P. L. 194, that wholesale licenses to dealers, brewers, distillers, bottlers, etc., "shall be granted only by the Court of Quarter Sessions of the proper county, in such manner as is provided by existing laws," does not confer upon such courts the discretionary powers conferred by the act of May 13, 1887, P. L. 108, relating to licenses to sell liquors by retail.
3. The retail license act of May 13, 1887, being an act to restrain and regulate the sale of liquors, and the wholesale license act of May 24, 1887, being an act providing for revenue, with no reference in the latter act to the provisions of the former, the "existing laws" referred to in the latter act are the existing laws in force in the proper county relating to the granting of wholesale licenses.
4. The existing law relating to the granting of wholesale licenses in Allegheny county is the act of April 3, 1872, P. L. 843, which, in respect of the qualifications of applicants, is unrepealed by the act of May 24, 1887, P. L. 194, and imposes upon applicants no qualifications save that they must be citizens of the United States, of temperate habits, and of good moral character.
5. Wherefore, a petitioner for a wholesale license as a dealer, brewer, distiller, or bottler, etc., in said county, who has presented his application in due form and has complied with the requisites of the law, has prima facie a right to such license, and, in the absence of anything upon the record to impeach such right, the refusal of the court to grant it will be reversed.
6. If, however, a remonstrance is filed setting forth that the petitioner is disqualified, because not a citizen of the United States, or not of temperate habits, or not of good moral character, it is the duty of the court to hear the case, and, if the remonstrance is sustained by evidence, to refuse the license; and the refusal, on such grounds alone, is the exercise of a discretionary power which is not reviewable.

* This case, though belonging to the Western District, is reported here because of its relation to the license cases following.

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Statement of Facts.

Before PAXSON, C. J., STERRETT, GREEN, CLARK, WILLIAMS, MCCOLLUM and MITCHELL, JJ.

No. 121 October Term 1889, Sup. Ct. (W. D.); court below, No. 1230 March Term 1889, Q. S.

On February 5, 1889, M. E. Pollard, widow of Thomas Pollard, deceased, filed her petition praying the court to grant her a license to sell liquors at wholesale, under the act of May 24, 1887, P. L. 194. The petition was in due form, under the rules in such cases, and set forth that the petitioner was a citizen of the United States; that she resided at the corner of Stanton and Euclid avenues, in the 19th ward, Pittsburgh, and had resided therein for four years; and that the place for which a license was desired was at No. 1044 Penn avenue, occupied the last year as a wholesale liquor store by the husband of the petitioner. A bond, in due form also, was filed with the petition.

The rules in force relating to the granting of wholesale licenses, adopted January 21, 1888, were the following:

"RULE 6.

"Wholesale dealers, brewers, distillers, rectifiers, compounders, storekeepers, agents and bottlers applying for license to transact business under the provisions of the act of assembly, approved May 24, 1887, shall in their petition conform to the requirements of the first, second, third, fourth and tenth paragraphs of section 5 of the act of assembly, approved 13th May, 1887, P. L. 109, 110. The petition shall also give the names of no less than two reputable resident freeholders of the county, who will be sureties on the bond of the applicant, and a statement that each of said two sureties is a bona fide owner of real estate in the county worth over and above all incumbrances the sum of two thousand dollars, and that it would sell for that much at public sale.

"RULE 7.

"The Rules of Court in relation to retail dealers shall apply to applications under the act of 24th May, 1887, as to time of filing petitions, advertisement thereof, and the date from which licenses shall run, and also as to petitions in favor of and re-

Statement of Facts.

monstrances against the granting of a license; such applications will be heard on the first Monday of April in each year, and the hearing shall be continued for such length of time as may be necessary to dispose of all the applications."

An act of assembly entitled "An act to regulate the sale of intoxicating liquors in the county of Allegheny," approved April 3, 1872, P. L. 843, provided:

"SECTION 1. That all laws and parts of laws now in force, relative to the sale of vinous, spirituous, malt or brewed liquors, or any admixtures thereof, in the county of Allegheny, or any part thereof, be and the same are hereby repealed; and from and after the passage of this act it shall be unlawful to keep or maintain in said county any house, room or place where vinous, spirituous, malt or brewed liquors, or any admixtures thereof, are sold or drank, except as hereinafter provided: Provided, That this act shall not be construed to repeal or affect any special law prohibiting the sale of intoxicating liquors, or prohibiting the granting of licenses, in any borough or township in Allegheny county.

"SECTION 2. The treasurer of said county shall, annually, upon payment to him of the license fees, and the receiving of the bond hereinafter mentioned, grant the license hereinafter specified to citizens of the United States, of temperate habits and good moral character, for the term of one year, to be computed from either the first days of May, August, November or February following the date of the granting thereof: Provided, That in no instance shall a license be dated back of the time of its being issued, nor shall any liquors be allowed to be sold under said license, until the year for which the license issues shall have commenced."

The provisions of the act of May 24, 1887, P. L. 194, entitled "An act providing for the licensing of wholesale dealers in intoxicating liquors," are quoted in the opinion of the Supreme Court.

On April 13, 1889, the petitioner and one of her salesmen were examined before the court, and testified to the amount of business done in the preceding year in the sale of whiskey and beer; that whiskey and beer were sold in barrels, casks, jugs, and in bottles put up in cases, and that sales were made to clubs and to dealers, in the city and other places. No objec-

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tion or remonstrance against the granting of the license prayed for was filed.

On April 22, 1889, the petition was refused, the court, WHITE, J., filing no opinion showing reasons therefor. On the same day, however, like petitions in due form accompanied by bonds also in due form, filed by a large number of other applicants including the L. H. Harris Drug Co., Joseph Fleming & Son, druggists, T. D. Casey & Co. and Joseph Einstein & Co., bottlers, without objection or remonstrance filed, were also refused, and the court, WHITE, J., filed a general opinion relating to both retail and wholesale licenses, which in part was as follows:

Unexpectedly and much against my will I was thrown into the license court this year and had to hold it alone. I felt the great responsibility, and knew how the court might be criticised and misrepresented. But a judge who shrinks from any duty, or is deterred from a faithful performance of it, from fear of personal consequences, is unworthy his office.

At the beginning of the court and during its sittings, the Department of Public Safety of the city of Pittsburgh presented certain papers in open court complaining of numerous violations of the law by brewers, wholesale and retail dealers, and calling upon the court to aid the department in suppressing these evils, and securing good municipal government. These papers, and the duty of the court under the law, required a searching and thorough examination of the applicants. Nor could they complain of this. The law requires certain qualifications in the applicants, and if they have had license, that they shall have observed all the laws on the subject. By their applications they assert in court that they possess these qualifications and have faithfully kept these laws. It is the right and duty of the court to give them a thorough cross-examination.

The law requires that all applicants for retail license shall be citizens and men of "temperate habits and good moral character;" also that the court "shall refuse the license when it is not necessary for the accommodation of the public and the entertainment of strangers and travelers." This is the imperative mandate of the statute. The evils of intemperance and excessive drinking had become so great and widespread, that the pub-

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lic welfare required more stringent regulations on the subject. The acts of 1887 were passed to check these evils. The act in reference to distillers, brewers, wholesale dealers and bottlers, was before the legislature at the same time as the retail act, and should be construed in connection with it, both as parts of the new system; for in all these cases the court is required to hear remonstrances and objections and exercise a sound discretion. If these acts are too stringent the remedy is with the legislature. The courts should administer them in their true intent and spirit. The court has no right to construe these acts in accordance with any personal views on the subject, or stretch them to meet any supposed public demand.

As many applicants were refused, and some who had license last year, it is proper to state the grounds of the court's action; not the reasons in each particular case, but classifying them under several general heads. Some were refused on one ground and some on several.

RETAIL DEALERS.

* * * * *

DISTILLERS AND BREWERS.

The Department of Public Safety complained that distillers, brewers and wholesale dealers were habitually supplying liquors to unlicensed houses, and that while this continued it was impossible to suppress the illegal traffic. Some of the distillers, and most of the brewers and wholesale dealers, when closely pressed, had to admit that they had done so. Generally they were willing to confess the wrong and promise not to be guilty in the future. These were granted license on that condition. But some claimed the right to sell to any persons who would pay, without inquiring or caring whether or not they were engaged in the illegal traffic. Of course, such were refused. One who sells to another to carry on an illegal business becomes a party to the unlawful act, and is just as guilty as the direct violator of the law.

Another serious complaint against distillers, brewers and wholesale dealers was, that they were selling enormous quantities in jugs, small kegs and bottles, and delivering them late at night, and at improper and suspicious places. The jug trade is a new business. It started up after the license court of last

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year. It has been one of the greatest sources of drunkenness and trouble. Parties would get jugs or small kegs at the brewery, and taking them to a shanty, back yard or vacant lot, have a drunken frolic all night, and frequently this occurred with boys. That this kind of business shall cease, is also made a condition in the licenses now granted. If it continues, or the practice of selling to unlicensed houses, the license will be revoked.

WHOLESALE DRUGGISTS.

Retail druggists are not entitled to a license to sell liquors by wholesale. It is a totally distinct business. Nor are wholesale druggists, where the intention is to enter largely into the liquor business. But it may be a convenience to wholesale druggists to have a wholesale liquor license, when filling orders from retail drug stores in the country, or to furnish a quart or gallon of liquor occasionally for proper purposes in the city. But it should be merely incidental to their other business, and the amount sold be a small fraction of their total sales. When the liquor traffic, especially in bottles and jugs, becomes a main feature of their business, they should be refused license. On this principle the court has acted.

WHOLESALE DEALERS.

The retail dealers may sell not more than one quart, the wholesale dealers not less than one quart. This is the dividing line between the two classes of business. But the law means that the two shall be entirely different kinds of business. The main business of the retailer is drinks; the main business of the wholesaler, in large quantities, in bulk. When the retailer deals out extensively in bottles, pints or quarts, he is perverting his legitimate business; when the wholesaler deals out extensively in single bottles, he is perverting his legitimate business.

The most fruitful source of drunkenness and the greatest evil to boys and young men under age is the bottle trade. The examination of the applicants showed that many of the parties having a wholesale license did little more than a retail business in bottles. That the jug trade constituted a main feature of their business. Such a house is a greater evil than a retail house. It sells almost exclusively in the neighborhood. One

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man or boy buys a bottle or jug and half a dozen or a dozen get drunk on it. In harmony with the spirit of our present laws on the subject, the court has felt constrained to refuse many of these wholesale applicants who had license last year.

Another fact was developed during the examinations; that in the past year many drinking clubs were started in different parts of the cities and larger boroughs. These are most disgraceful and demoralizing associations. The members themselves seem to have thought so, for they were generally disguised under the name of a "Literary" or "Musical" society. This, however, is only a temporary evil, perhaps engendered by spiteful hostility to the stringent act of 1887. The clubs will soon die out. The bad effects are already seen and felt. The members will soon get ashamed of them and abandon them. The existence of such clubs is no argument in favor of more licensed houses, for the members could all get enough drinks without them. It is rather an argument in favor of more stringent regulations, and for drawing a tighter rein on those wholesale dealers who furnish them the liquors.

The bucket trade is a disgraceful business and also a great evil. It is not unlawful to sell a quart of beer or whiskey in a bucket. But when men, women and children are seen with buckets entering or coming from a saloon or liquor store, and carrying them along the streets to their homes, the sight is offensive and revolting to most persons, and is regarded as a sure sign that the persons are of a low class and the saloon or store one of the lowest and worst. There is an indecency about it that should not be tolerated. Some one has said the poor man ought to have the privilege of carrying his liquor in his bucket, for he cannot, like the rich man, have it sent in a demijohn by the express wagon to his house. But every man should have a decent respect to public opinion. Stopping the indecent bucket trade will not prevent any poor man from getting what liquor he wants.

BOTTLERS.

Bottling is a distinct business under the law. A wholesale dealer has no right, under a wholesale license, to convert his house into a bottling establishment. Some who had a wholesale license last year, did so, and are refused this year. Small

Argument.

bottling houses are generally an evil in the locality. It is difficult to conduct the business in a legitimate manner. Selling single bottles at the house, or peddling them about the streets, and selling to anybody who calls, is apt to run into an illegitimate business, selling to improper persons.

* * * * *

On April 26, 1889, Mrs. Pollard filed a petition for a rehearing upon her petition for license, and on May 9th, the petition for rehearing was refused. Thereupon the petitioner took this writ, specifying for error:

1. The court erred in refusing the application of Mary E. Pollard for a wholesale license.

2. The record showing that no objections were made or remonstrances filed to her application, the court erred in refusing the same.

3. So far as the record shows, Mary E. Pollard was entitled to a license to sell liquors at wholesale, and, therefore, the judgment of the court refusing her license is erroneous.

4. Mrs. Pollard being a citizen of the United States, and there being no intimation that she was either intemperate or of immoral character, the court below had no discretion, but were legally bound to grant her license on the record as it stood.

Writs of certiorari were also taken by the L. H. Harris Drug Co., Joseph Fleming & Son, T. D. Casey & Co., Joseph Einstein & Co. and a number of others, upon like cases with that of M. E. Pollard, the assignments of error raising the same question, and all the cases were argued together.

Mr. James R. Sterrett, Mr. John M. Kennedy, Mr. James C. Doty, Mr. Henry R. Ewing, Mr. Charles F. McKenna and Mr. D. T. Watson, for Mary E. Pollard, the L. H. Harris Drug Co. and Joseph Fleming & Son, plaintiffs in error.

Mr. J. S. Ferguson, Mr. Josiah Cohen and Mr. A. V. D. Watterson, for T. D. Casey & Co., plaintiffs in error.

Mr. John S. Robb and Mr. James Fitzsimmons, for Joseph Einstein & Co., and others, plaintiffs in error:

We have no controversy upon the rules laid down in *Raudenbusch's Petition*, 120 Pa. 329. Our cases do not involve a

Argument.

discretionary act of the court, but they each and all involve a question of power which is always reviewable on certiorari. The act of May 24, 1887, vested in the Court of Quarter Sessions a power not judicial in its nature, the granting or refusal of wholesale licenses. The only power of the court is from the act itself, and the jurisdiction conferred is special and limited. The maxim, *omnia præsumentur rite esse acta*, does not apply as it does to questions arising under the common law. The statutory reasons for an order reviewed must appear on the record; and this court is authorized by writ of certiorari to review the proceedings of the Court of Quarter Sessions in any matter specially committed to it by statute, so far as to inquire and determine the extent and limits of its power, and the regularity of its exercise: *Commissioners' App.*, 57 Pa. 453; *People v. Gas Light Co.*, 39 N. Y. 181; *Kimber v. Schuylkill Co.*, 20 Pa. 368; *Jones v. Tatham*, 20 Pa. 410; *Bacon's Abr.*, Courts, D., 4 B.; *Latham v. Edgerton*, 9 Cow. 228-9; *Smith v. Rice*, 11 Mass. 513, 514; *Bryson's Road*, 2 P. & W. 210.

1. The court below was of opinion that when the wholesale act of May 24, 1887, P. L. 194, provided that "licenses shall be granted only by the Court of Quarter Sessions of the proper county, in such manner as is provided by existing laws," it referred to and carried into it some of the provisions of the retail act of May 13, 1887, P. L. 108, and therefore, among its rules to govern the license court, established Rule 6, and held that no one was of right entitled to a wholesale license; that the discretion to grant or refuse was wholly with the court; that the necessity of wholesale stores should be taken into account and no more licenses should be granted than the court thought were necessary to transact the wholesale business; that wholesale dealers should not sell in bottles or jugs, though the quantity sold was one quart or more; and that druggists' sales should be but a small fraction of their total business, but what the percentage should be the court did not fix. It seems clear that the wholesale act does not authorize any of these rulings, and in so holding the court acted beyond the scope of its power.

2. The act of May 24, 1887, does not vest in the Court of Quarter Sessions a discretionary power to grant or refuse a

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wholesale license as under all the circumstances it may deem proper. On the contrary, the act plainly states that licenses "shall" be granted, and the jurisdiction in the Court of Quarter Sessions to refuse a license, arises only when objections and remonstrances are filed, setting forth some fact which, under the act, would be ground of refusal. A comparison of the language of the retail act of May 13, 1887, with that of the wholesale act of May 24, 1887, plainly shows that while the former act was intended to regulate and restrain the sale of liquor by retail, and to vest a large discretion in the court, the latter act, on the contrary, was merely a revenue act and gave no power to the court, unless objections and remonstrances were filed. If a man or woman is a citizen of the United States, and is neither intemperate nor immoral, he or she may have a license to sell liquors at wholesale. This the wholesale act of 1887 says, and it is similar in this respect to § 7, act of March 31, 1856, P. L. 200, as modified by § 6, act of April 20, 1858, P. L. 365, which was held to be mandatory in its provisions: *Schlaudecker v. Marshall*, 72 Pa. 200.

3. No portion of the retail act of May 13, 1887, is carried into the wholesale act of May 24, 1887. The words of the latter act, providing that licenses shall be granted only by the Court of Quarter Sessions "in such manner as is provided by existing laws," refers either, (a) to the special act of April 3, 1872, P. L. 843, relating to Allegheny county, or (b) to the general act of March 31, 1856, as amended by the act of April 20, 1858. In either case, it is the duty of the court to grant licenses to all who comply with the act. Neither the retail act of 1887, nor the wholesale act of 1887, repealed the prior acts relating to wholesale licenses, and especially the local act of April 3, 1872, so far as relating to the qualifications of petitioners. One statute is not to be construed to repeal a prior one which is not irreconcilable with it: *Brown v. Commissioners*, 21 Pa. 43; *Barber's Election*, 86 Pa. 392; *Sifred v. Commonwealth*, 104 Pa. 181. Under the act of 1872, licenses in Allegheny county were granted by the county treasurer. Under this as the "existing law," the "manner" was simple,—the license fee was paid and the license was issued.

4. When, therefore, the wholesale act of 1887 provided that the licenses should be granted "in such manner as is provided

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by existing laws," it referred of course to wholesale licenses; and then comes the provision requiring a time to be fixed at which applicants for and all persons making objections against, "may be heard by evidence, petition, remonstrance or counsel." If this provision be difficult of construction, one thing is plain; that if a discretion is given to the court to refuse a petition for a wholesale license, it is only when objections to the grant thereof are properly made. It is not the court, or the judge thereof, who grants the license; it is the state. The words of the act of May 24, 1887, we earnestly urge, show that the legislature intended that licenses should be granted in all cases where the record shows that the application was regular, and that neither objections nor remonstrances were filed thereto.

POLLARD'S PETITION.

OPINION, MR. CHIEF JUSTICE PAXSON:

The plaintiff in error presented her petition to the Court of Quarter Sessions of Allegheny county, praying for a license to sell liquors at wholesale at No 1044 Penn avenue, in said city. The petition was in proper form, and it was not denied that she had complied with all the requirements of the law. Upon the hearing of her petition, there was no remonstrance or objection to the granting of her license, or to the form of her petition or bond. The court below refused her application, and also declined to grant a rehearing. The record, which has been brought up by the writ of certiorari, fails to disclose any remonstrance filed or objection made to her application. Under such circumstances is the case reviewable here?

We decided in Raudenbusch's Petition, 120 Pa. 328, that the granting of a license to sell liquor at retail, under the act of May 13, 1887, P. L. 108, was within the discretion of the Quarter Sessions, and not reviewable upon certiorari. The court below applied the doctrine of that case to applications for licenses, made under the act of May 24, 1887, P. L. 194, "providing for the licensing of wholesale dealers in intoxicating liquors." The narrow question presented for our consideration is, whether under the act relating to wholesale licenses, the court has the same discretion to grant or refuse a license as it has under the prior act relating to retail licenses.

It requires but a glance at the two acts to see that their ob-

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ject is essentially different. The retail act of May 13th was intended to restrain the sale of liquors. This clearly appears in its title, which reads: "An act to restrain and regulate the sale of vinous and spirituous, malt or brewed liquors, or any admixtures thereof." This was the construction placed upon that act in Raudenbusch's Petition, *supra*. The act of May 24, providing for wholesale licenses was a revenue act. There is not a word in it to indicate any intention of restraining the sale of liquor. The second and third sections of said act are as follows:

"Section 2. Licenses shall be granted only by the Court of Quarter Sessions of the proper county, in such manner as is provided by existing laws, and shall be for one year from a date fixed by rule or standing order of said court: the said court shall fix by rule or standing order a time at which applications for said licenses shall be heard, at which time all persons applying or making objections to applications for licenses may be heard by evidence, petition, remonstrance, or counsel: Provided, That for the present year licenses may be granted under previous laws at any session fixed by said court, not later than June 30th. Provided, further, That it shall not be lawful for any rectifier, compounder, wholesale dealer, store-keeper, agent or bottler to sell in less quantities than one quart, and distillers, brewers, and manufacturers shall not sell in less quantities than one gallon.

"Section 3. That all bottlers within the commonwealth shall be required to procure license from the Court of Quarter Sessions of the respective counties in which they are located, in the manner provided for in the second section of this act, for which they shall pay the sum of two hundred dollars in cities of the first, second, and third classes, one hundred dollars in all other cities, boroughs and townships: Provided, That no bottler shall be permitted to sell spirituous, vinous, malt, or brewed liquors to be drank upon the premises where sold, nor at any place provided by such seller for such purpose."

There are two things to be noticed in the second section above quoted. They are (a) that licenses shall be granted by the Court of Quarter Sessions, in such manner as is provided by existing laws, and (b) that applications for licenses may be

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heard by evidence, petition, remonstrance, or counsel. From the latter proposition it may be argued with some force that the court has a discretion in the matter of wholesale licenses. For of what use would it be to hear an application by "evidence, petition, remonstrance, or counsel," unless the court has the power to decide, that is, to grant or refuse such application. All this is conceded. The court has a discretion in such cases; it will be our purpose to define the character of that discretion and its extent.

As preliminary to the discussion of this point, it is proper to refer to that portion of the second section (a), which provides that licenses shall be granted by the court, "in such manner as is provided by existing laws." What existing laws are here referred to? Clearly, the existing laws in regard to wholesale licenses. I know that the opinion has prevailed in some quarters that the effect of these words is to read into the wholesale act several sections of the previous retail act. This construction is so palpably erroneous that it would be a waste of time to discuss it. There is no reference in the one act to the other. The act in force in the county of Allegheny in May, 1887, in regard to wholesale licenses, was the special or local law of April 3, 1872, P. L. 848, applicable to Allegheny county only, which provides, *inter alia*, that "The treasurer of said county shall, annually, upon payment to him of the license fees, and the receiving of the bond hereinafter mentioned, grant the licenses hereinafter specified, to citizens of the United States of temperate habits and good moral character," etc. The act of May 24, 1887, contains no repealing clause. The act of 1872 is not repealed in express terms or by necessary implication, so far as regards wholesale licenses, excepting to the extent that the one act is supplied by the other. Thus, the act of 1887 declares that wholesale licenses shall be granted by the Court of Quarter Sessions, instead of by the county treasurer; it provides for a hearing by the court of applications for such licenses; makes a different classification of venders and fixes a different rate to be paid. But it imposes no qualifications upon applicants for wholesale licenses; it does not even require that they shall be citizens of the United States, or that they shall be persons of temperate habits, or of good moral character. Where are we to look for these qualifications? Certainly

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not in the retail act, which has nothing whatever to do with it, but in the existing laws in regard to wholesale licenses, to wit, the act of 1872. There is nothing in the act of 1872, which as before observed is a local act, applicable only to the county of Allegheny, to indicate that any qualification was requisite for a wholesale dealer than those above mentioned; or, that any discretion existed in the Court of Quarter Sessions to refuse such license, except for cause, and such cause must relate to one of three things, viz.: citizenship, character, or sobriety. It follows that a citizen of the United States, of temperate habits and good character, who presents his application for a wholesale license in due form, and who has complied with the requisites of the law, has *prima facie* a right to such license. In the absence of anything upon the record to impeach such right, it is the duty of the court to grant it. If a remonstrance is filed setting forth that the applicant is disqualified for either of the three causes above stated, it is the duty of the court to hear the case, and if the remonstrance is sustained by evidence, to refuse a license. Such case is not reviewable here, for the reason that it would be a proper exercise of the discretion conferred upon the court by the act of May 24, 1887. But the discretion goes no further. It does not extend to an arbitrary refusal of a license. I use the word arbitrary in no offensive sense, but to indicate the refusal of a wholesale license for reasons other than those above indicated. The learned judge below has performed a thankless and most unpleasant duty, and we are satisfied he has done so without fear or favoritism. But we are compelled to differ from him in our construction of the act of assembly referred to.

An extended argument is not needed to show that the discretion conferred upon the court by the retail act of 1887, does not extend to the wholesale act. A few words upon this subject, however, may be appropriately added. As before observed, the object and leading thought in the former act was to restrain and regulate the sale of liquor; that is to say, to restrain its sale to the consumer. It was for such reason that a large discretion was conferred upon the Quarter Sessions. If we contrast the second section, above quoted, of the wholesale act, with the seventh section of the retail act, the difference between them is palpable. The said seventh section is as follows:

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"The said Court of Quarter Sessions shall hear petitions from residents of the ward, borough or township, in addition to that of the applicant, in favor of [and] remonstrances against the application for such license, and in all cases shall refuse the same whenever in the opinion of the said court, having due regard to the number and character of the petitioners for and against such application, such license is not necessary for the accommodation of the public and entertainment of strangers or travelers, or that the applicant or applicants is or are not fit persons to whom such license should be granted, and, upon sufficient cause being shown or proof being made to the said court that the party holding a license has violated any law of this commonwealth relating to the sale of liquors, the Court of Quarter Sessions shall, upon notice being given to the person so licensed, revoke the said license."

We cannot incorporate or read into the wholesale act the above section of the retail act, for the reason that we are not clothed with legislative powers. Moreover, it is inapplicable to wholesale licenses. What has the court to do with the question whether a particular wholesale license is "necessary for the accommodation of the public and entertainment of strangers or travelers?" In the case of a retail license the court may well inquire, indeed it is its duty to do so, whether the public accommodation in the particular ward, street or block, requires that the applicant shall be licensed. The whole theory upon which retailers are licensed, and it is the theory of the law, is that they are needed for the public accommodation, to provide places where strangers and travelers may rest, and procure needed refreshments. Hence it may very well be, as was said in Raudenbusch's Petition, *supra*, that "if a ward has one hundred public houses, where only fifty are required by the public wants, it is plain that fifty houses must be denied license, although every one of the applicants is a worthy man and keeps a respectable house, and although there be neither remonstrance nor objection on the score of want of fitness." None of this reasoning applies to a wholesale license. It is not granted for the convenience of a particular neighborhood, nor for the accommodation of strangers or travelers. Nor does it matter where the place of business is located. If all the wholesale liquor houses in Pittsburgh were in a single

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block, it would make no difference, and would be no objection to their being licensed. Their business is not confined to any particular locality; on the contrary, it is general, and we may fairly infer from the knowledge of trade which every intelligent man possesses, that but a small portion of the sales of a wholesale house is confined to the city or place in which it is located. How then would it be possible for a judge to intelligently exercise a discretion as to the need of a wholesale house in a particular location? The power to close up large establishments, such as breweries, distilleries, and wholesale liquor houses, when perhaps hundreds of thousands of dollars are invested therein, is too vast to be exercised by any man or any court, excepting upon the clearest grant of legislative authority. It cannot be done upon mere implication.

We are in no doubt as to our power to revise the proceedings below upon this writ. This court possesses and exercises the powers of the King's Bench, and it was said of them by the late Justice SHARSWOOD, in *Commissioners' App.*, 57 Pa. 452: "It is beyond all question that under these extensive powers, this court is authorized to examine and review the proceedings of the Court of Quarter Sessions in any matter specially committed to it by statute, so far as to inquire and determine the extent and limits of its power and the regularity of its exercise. It is equally clear that the proper mode of asserting this jurisdiction is by bringing the record of its proceedings before us for inspection by writ of certiorari." And it was held by the Court of Errors and Appeals of New York, in the *People v. Citizens' Gas Light Co.*, 39 N. Y. 81, in speaking of the writ of certiorari, that "its office extends unquestionably to the review of all questions of jurisdiction, power, and authority of the inferior tribunals to do the acts complained of, and all questions of regularity in the proceedings; that is, all questions whether the inferior tribunal has kept within the boundaries prescribed for it by the express terms of the statute law, or by the well settled principles of the common law."

The granting of wholesale licenses is a matter specially committed by act of assembly to the Courts of Quarter Sessions. Upon the writ of certiorari we may review their proceedings so far as to see whether they have kept within the limits of the powers thus conferred, and have exercised them in conformity

Syllabus.

with law. We are of opinion that those powers have been exceeded in this instance, and that upon the face of this record the petitioner was entitled to her license.

The order of the court below refusing it is reversed, and a procedendo awarded.

L. HARRIS DRUG CO.'S PETITION.
JOSEPH FLEMING & SON'S PETITION.
T. D. CASEY & SON'S PETITION.

OPINION, MR. CHIEF JUSTICE PAXSON :

These cases are upon all fours with Pollard's Case, just decided. We need not repeat what was there said.

The order refusing a license in each of the above cases is reversed, and a procedendo awarded.

JOSEPH EINSTEIN & CO.'S PETITION, ET AL.

These cases were all applications for a bottler's license, under the act of May 24, 1887. As we are unable to distinguish them in principle from Pollard's Case, just decided,

The order refusing such license is reversed in each case, and a procedendo awarded.

PETITION OF THE PROSPECT BREWING CO.

FOR A MANDAMUS TO THE COURT OF QUARTER SESSIONS OF
PHILADELPHIA COUNTY.

Argued June 5, 1889—Decided June 28, 1889.

[To be reported.]

1. In granting licenses to wholesale dealers, brewers, distillers, etc., under the act of May 24, 1887, P. L. 194, the Court of Quarter Sessions of Philadelphia county has not the large discretion conferred upon it by the retail act of May 13, 1887, P. L. 108: Pollard's Petition, ante, 507; Nordstrom's Petition, post, 542; Knarr's Petition, post, 554.
2. The discretion conferred upon that court by the act of May 24, 1887, is a qualified and limited discretion, and is confined to the inquiry whether

127	523
127	550
127	551
127	553
127	557
127	558
127	523
134	554
127	523
156	325
127	523
161	383

127	523
25	SC 13
127	523
32	SC 327

127	523
226	58
226	62

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the applicant for a wholesale license is a citizen of the United States, of temperate habits, and of good moral character.

3. Where no objection or remonstrance appears on the record of the case, alleging that the petitioner was disqualified in respect of either of the above grounds, citizenship, temperate habits, or moral character, the order of the court refusing the license to the petitioner will be reversed.
4. The said act of May 24, 1887, confers upon that court no power to determine the fitness of a person to receive a wholesale license upon the findings of the court upon other matters outside of the qualifications mentioned, to wit: citizenship, habits or moral character.
5. The return to a writ of alternative mandamus requires the greatest possible certainty; not merely certainty to a common intent, or certainty to a certain intent in general, but certainty to the greatest possible intent; or, as it is sometimes called, certainty to a certain intent in every particular.
6. A return to such writ directed to the Court of Quarter Sessions refusing the petition of a corporation for a brewer's wholesale license, setting forth that an averment of the relator's petition was incomplete, inaccurate and misleading, but not showing in what respect; that the company had conducted its business in violation of law, but not showing what law; that the company was not a fit person to receive the license applied for, but not showing a cause of disqualification within the law; that the company did not possess a good moral character, but not averring that the officers and directors thereof, were respectively men of bad moral character; such return is insufficient.

Before PAXSON, C. J., STERRETT, GREEN, CLARK, WILLIAMS, MCCOLLUM and MITCHELL, JJ.

No. 000 July Term 1889, Sup. Ct. (E. D.)

On May 24, 1889, the petition of the Prospect Brewing Co. was filed in the Supreme Court representing:

That the petitioner was a body politic duly incorporated under the corporation act of April 29, 1874, P. L. 73, and the supplements thereto, under the name of The Prospect Brewing Company, for the purpose of "the brewing of all kinds of malt liquors, and the sale thereof;" that upon its incorporation the petitioner at once entered upon the business, the manufacture and brewing of malt liquors, and the bottling and sale thereof, and had been engaged in the same from the date of incorporation until the present time continuously.

"6. That the business plant of your petitioner, the said company, consists of real estate, apparatus, utensils, and other property, of the value of \$630,000. The annual product of the

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brewery of your petitioner, the said company, is very considerable, consisting of about thirty-five thousand four hundred barrels, of which quantity about two million bottles are bottled for domestic consumption and export, the same being distributed by exportation to Canada, Mexico, Porto Rico, Rio Janeiro, Buenos Ayres, Montevideo, and through the United States, by means of agents in San Francisco, Cal., Savannah, Ga., Charleston, S. C., Charlotte, Raleigh, N. C., Jacksonville, Fla., Norfolk, Richmond, Va., Baltimore, Md., Camden, Newark, Sea Isle, Atlantic City, N. J., Boston, Mass., and somewhat less than one third of the whole product is sold and consumed in the city of Philadelphia. The said company employs seventy workmen and employees, with an annual wage-list of over \$54,000.

"7. Licenses for the continuance of the said business by your petitioner have been regularly obtained by it, including the past year of 1888; and on the fourth day of February, 1889, your petitioner filed its application to the Court of Quarter Sessions of the county of Philadelphia for a renewal of its license for the year beginning the first day of June, 1889, under the provisions of the act of May 24, 1887, entitled 'An Act providing for the licensing of wholesale dealers in intoxicating liquors.'

"8. Upon the seventh, eighth, and ninth days of May, 1889, a hearing was had upon the said petition, and no remonstrance or objection, so far as is known to your petitioners, or as appears by entries and records of the said court, was presented or made by any one to the granting of the said license. Upon the hearing of the said application of the said Prospect Brewing Co., no objection to or remonstrance against the granting of its license having been made by any one, one of the judges of the said court asked the superintendent of the said company, one of its employees, whether the petitioner sold a drink called Ambrosia, to which he answered affirmatively. The said superintendent being then further asked by said judge the component parts of said drink, he at first hesitated to answer, saying its manufacture was a trade secret, but stated that it was a non-intoxicant, containing only one and one half per cent of alcoholic strength to the mass, and that it had been sold in the state of Delaware as such non-intoxicant under judicial decis-

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ions, and also in the same way in the state of New Jersey. To a further question from the judge whether he had not sold it as a non-intoxicant to unlicensed persons in this city, telling them that they could sell it as such, he replied that he had never said so to any one; he told them that it had been sold in New Jersey and Delaware, but they would have to consult lawyers before they could sell it here. He said he had been very careful, and had declined to put Ambrosia labels on beer, when one man had asked him to do so. The court demanded the name of the individual, and he said it was one Fitzpatrick. Dr. Henry Leffmann was then called by the court, who testified to having examined Ambrosia chemically, and corroborated Wolters as to its alcoholic strength. This witness said it was a very light form of beer. Its average alcoholic strength was between one and a quarter per cent and one and three quarters per cent. The court adjourned and the parties were told to come the next day, and on the next day the judges called Fitzpatrick, who denied that he had asked for beer with Ambrosia labels, and stated he had been told by the man in charge of the bottling house that it was a soft drink. Mr. Wolters, on being confronted with Fitzpatrick, said he had never seen the man before to his knowledge, and that his request to have the beer served with Ambrosia labels had come through the bottling house. Mr. Wolters was then asked by the court whether he knew a man named Arthur Cunningham. He said he did. The court then asked whether he, Wolters, had not told Cunningham that he did not require a license to sell Ambrosia. He said he had not, nor had told anybody so. The court then called Cunningham, who testified that he had been deprived of his license last year, and a few days after the 1st of June, 1888, the brewing company's driver left a box of Ambrosia at his place; that he did not know what it was, and went to see Mr. Wolters about it, and that Mr. Wolters told him it was a soft drink and anybody could sell it. The hearing was continued until the next day, when Mr. Wolters produced two witnesses, who testified that they were told by him, early in June, 1888, that they could not, he thought, sell Ambrosia without a license, and had better let it alone; and he also produced Secretary Charles Wolters, Jr., who was in charge of the bottling establishment, and John Ludwig, bot-

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tlar of said establishment, who both testified they had never said to any one that Ambrosia could be sold without a license. The counsel for petitioner then stated to the court that after the district attorney of the county had told him that he believed this mixture, Ambrosia, was obnoxious to the law as coming within the words, prohibited admixture, he had advised the brewing company's officers not to permit any person to purchase Ambrosia, who was not known by them to be a licensed dealer or seller, except to known private families for domestic consumption, and that thereafter none was sold, and this was within twelve days of June 1, 1888. No further or other proceedings were therein had than as abovementioned.

"The hearing then closed, and on Wednesday, May 15, 1889, the court certified to the city commissioners their refusal to grant a license to the Prospect Brewing Company, either as brewer or bottler, and no reasons were given by the court for this action. An application for a reconsideration of the petition was made and refused."

That from the decree of said court refusing said license there was no appeal, no bill of exceptions, nor a writ of error; and the action of said court being a refusal to grant to the said company that which the law entitles it to, it having complied with all the requirements thereof, the petitioner prayed that the court would grant a writ of alternative mandamus directed to the judges of the said Court of Quarter Sessions, etc.

The writ prayed for having been awarded and served, the following return was made thereto :

The return of D. Newlin Fell, Robert N. Willson, James Gay Gordon and F. Amédée Brégy, judges of the Court of Quarter Sessions for the county of Philadelphia, respectfully sheweth :

The respondents constituted a Court of Quarter Sessions for the county of Philadelphia, which met on various days in the months of March, April and May, 1889, to hear and decide applications for licenses to manufacture, to sell, and to bottle, intoxicating liquors in the city of Philadelphia, during the year which would commence on the first day of June, 1889.

Before deciding said applications said court deemed it to be its duty to determine whether the applicants were citizens of the United States, of temperate habits, of good moral character and fit persons to receive a license.

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Amongst the applications presented to said court was that of the Prospect Brewing Company, which applied for a wholesale liquor license to conduct the business of brewers of malt liquors, and also for what is known as a bottler's license.

At the hearing thereof, evidence, in the opinion of the court unfavorable thereto, was first elicited by the cross-examination of the company's vice-president by the counsel of the Law and Order Society, an organization of citizens for the purpose of making objections to the granting of petitions and of securing the enforcement of the laws governing the sale of intoxicating liquors.

Thereafter the case was further heard during parts of three days, viz., the seventh, eighth, and ninth days of May, 1889. A considerable amount of testimony favoring and opposing the application was offered to and received by the court. The statement of testimony made in the petitions of the relators is incomplete, inaccurate and misleading; but respondents respectfully submit that it is not their duty to return to this honorable court the evidence which was heard by said court.

The court carefully considered all said testimony, and necessarily passed upon the credibility of the witnesses.

The court did find, from the evidence, that during the year of its license then about to expire, the said company, through its chief executive officers, who had been charged with the conduct of its business, had caused to be brewed an intoxicating malt liquor for the purpose of selling the same to unlicensed dealers in the city of Philadelphia, to be by the latter again sold in this city in violation of the laws of the commonwealth; that said intoxicating malt liquor thus brewed by said company had been sold by it to numerous unlicensed dealers in the expectation that the same would be sold by them in this city in violation of law; that through its said officers said company, by false representations as to the character of said liquor, had induced divers unlicensed dealers to purchase the same from it; and that said liquor thus purchased had been sold in the city of Philadelphia by said unlicensed dealers.

The court did find that the said company had conducted its business during the year then expiring in violation of law. It did further find that said company was not a fit person to

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receive the licenses applied for; and that, so far as it was possible for a corporation to possess any moral character, it did not possess a good moral character.

The said court, in the exercise of the discretion conferred upon it by law, in accordance with the evidence, as understood by it, did refuse the licenses which were applied for by the Prospect Brewing Company.

Respondents admit the truth of the averments of fact in the seventh paragraph of the relator's petition.

Respondents do not possess sufficient knowledge or information to answer as to the truth of many of the averments of fact in the said petition. They respectfully submit, however, that it is not necessary for them further to make answer thereto.

Mr. F. Sheppard and Mr. G. W. Biddle, for the petitioner:

1. A comparison and contrast of the provisions of the act of May 13, 1887, P. L. 108, "to restrain and regulate" the sale of liquors, with the act of May 24, 1887, P. L. 194, providing for the licensing of wholesale dealers in liquors, becomes necessary. None of the provisions of §§ 7, 11, 12, 13, 14, 17 and 18 of the act of May 13, 1887, are found in the act of May 24th. From the scope of the whole act of May 13th, it is obvious that it was the introduction of a system to pervade the whole state, by which the repression of intemperance was attempted to be effected through the restriction of the sale of intoxicating drinks and probably by the diminution of the places in which such sales might be made. It was a stringent mode of dealing with and regulation of the sale by retail of vinous, spirituous, and brewed liquors. It authorized in terms the refusal of a license, where, in the opinion of the court, after hearing applications therefor, and petitioners for and against the application, the license was either unnecessary, or the applicant was an unfit person to whom the license should be granted, or where the party applying for the license had previously violated any law relating to the sale of liquors.

2. The act of May 24, 1887, providing for the licensing of wholesale dealers in intoxicating liquors, in its first section simply fixes the amount to be paid for such license; the second section provides that licenses shall be granted in such

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manner as is provided by existing laws, and enacts that a time shall be fixed, at which the applications for license shall be heard, when all persons applying, or making objections to applications, may be heard by evidence, petition, remonstrance, or counsel. There is no direct power given to refuse the license; and no other part of this, or of the next and last section, in any way refers to this subject. What the objections may be which are referred to in the second section, are not stated; but they may be inferred to be objections arising out of the two provisions at the end of the second and third sections respectively of the act, or possibly some objection as to the character of the place in which the business sought to be licensed is carried on. Whatsoever these objections may be, however, they must be objections made by some one in the shape of a petition or remonstrance, and supported by evidence, and if thought necessary, by the arguments of counsel, unless a petition or remonstrance, written or verbal, containing a specific objection to the application is made. There is no warrant found in the act itself for dealing with the subject by way of refusal of the license upon a suggestion emanating from the tribunal which is to hear the remonstrance or objection.

8. If we compare the language of the second section of the act of May 24th with the language of the fourth and seventh sections of the act of May 13th, the contrast between the two acts is very striking. And it may be fairly said that while the first of these acts was dealing exclusively with the moral and social aspects of the question, the second act dealt with the financial side of the subject. This view becomes very much more apparent when we bear in mind that in the case of the Prospect Brewing Company it is asserted in the petition for the writ of mandamus that somewhat less than one third of the whole product manufactured by it is sold and consumed in the city of Philadelphia, leaving more than two thirds to be exported to the places named in the sixth paragraph of the petitioner's suggestion, throughout the United States and foreign countries; one act is thus dealing with the moral and social side of the question, the other with the financial. And in further confirmation of this, it must also be borne in mind that the act of May 24th, not only prohibits a distiller, brewer, and manufacturer from selling in less quantities than one gallon,

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but the bottlers spoken of in the third section are not allowed to sell any liquors to be drank upon the premises where sold, or at any place provided by the seller for that purpose. It is obvious that, no matter what the quantity manufactured by wholesale dealers be, if the provisions of the act in regard to the sale of liquors in small quantities be carried out, it becomes a matter of no import, so far as this community is concerned, what the quantity manufactured may be.

4. Not only was there no objection or remonstrance made to the granting of this license, but no reason was given by the court for its refusal to grant it. We are driven altogether to inference on the subject. No one objected or remonstrated, and no one stated that the Prospect Brewing Co., by itself or its agents, sold in less quantities than one gallon. No one testified nor was any evidence produced that the product of the brewery was sold, to be drank on the premises or at any place provided by the seller for that purpose. These are the only two prohibitions specifically referred to in the act, and there is no warrant for importing any other prohibitions into it. Moreover, it was not pretended that the officers or managers of the company were not persons of temperate habits and good moral character, for no testimony was given upon this subject; and if the action of the court is to be upheld by what took place on the days of the hearing of the petitioner's application, we aver that nothing illegal in the supposed conduct of the superintendent, spoken of in the testimony, was shown to have taken place.

5. Nor can it be said that the provision of § 2, act of May 24, 1887, that licenses shall be granted "in such manner as is provided by existing laws," imports into the mode of proceeding by the court the provisions of the act of May 13, 1887, upon the subject. This becomes very clear if we bear in mind that the act of April 10, 1849, P. L. 570, was held as late as the year 1880 to be in force with the exception of so much of it as relates to the duties and powers of the Sinking Fund Commissioners: *Gross v. Commonwealth*, 39 Leg. Int. 61; and in *Kuebler v. Commonwealth*, 4 Pa. C. C. R. 1, it was held by the Common Pleas of Northampton county, upon the 27th September, 1886, that the act of March 31, 1856, § 3, authorizing licensed brewers to bottle and sell and deliver malt and brewed

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liquors in quantities not less than one dozen bottles, has not been repealed either directly or by implication. The phrase, existing laws, in the second section of the act of May 24, 1887, obviously applies to the body of legislation in force at the time the acts of the 13th and 24th May, 1887, were brought into existence. It would be a strained and forced implication to limit the words found in the act of 24th May to the previous act of 13th May, introduced at the same time as part of one system dealing with the whole general subject, and passed contemporaneously, the difference of the few days between the acts being probably due to the mere accident of the signature to one of the bills by the governor being affixed a few days earlier than to the other. The existing laws were the laws of 1849, and the other laws which bore upon the general subject of the licensing of wholesale dealers in malt liquors.

6. The authorities sufficiently vindicate our right to the use of the writ of mandamus in this proceeding. In *Virginia v. Rives*, 100 U. S. 313, Mr. Justice STRONG speaks as follows: "In what case such a writ is warranted by the principles and usages of law, it is not always easy to determine. Its use has been very much extended in modern times, and now it may be said to be an established remedy to oblige inferior courts and magistrates to do that justice which they are in duty and by virtue of their office bound to do. It does not lie to control judicial discretion, except when that discretion has been abused; but it is a remedy when the case is outside of the exercise of this discretion, and outside of the jurisdiction of the court or officer to which or to whom the writ is addressed. One of its peculiar and more common uses is to restrain inferior courts, and to keep them within their lawful bounds. This subject was discussed at length in *Ex parte Bradley*, 7 Wall. 364, and what was there said renders unnecessary any discussion of it now." See also *Strauder v. West Virginia*, 100 U. S. 304, and *Ex parte Virginia*, 100 U. S. 313. And upon the subject of the discretion to be exercised by the judges, we make the following references: *Tomlin's L. D.* and *Cunningham's L. D.*, title Discretion; *Rex v. Young*, 1 Burr. 556; *Eastwick v. London*, Styles, 43; *Rex v. Canterbury*, 15 East 139; *Rex v. Monmouth*, L. R. 5 Q. B. 256; *Queen v. Adamson*, 1 Q. B. Div. 201; *People v. The Superior Court*, 5 Wend. 115; *Rex v. Wilkes*, 4 Burr. 2539.

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Mr. John G. Johnson, for the respondents, filed no printed brief.

OPINION, MR. CHIEF JUSTICE PAXSON:

This was a writ of alternative mandamus directed to the judges of the Court of Quarter Sessions of Philadelphia holding the license court, commanding them to show cause why they should not grant the petitioner a brewers' license. The petition upon which the alternative writ was allowed sets forth, *inter alia*, that the Prospect Brewing Company is a corporation duly chartered under the laws of this state for the purpose of the brewing of all kinds of malt liquors and the sale thereof; that the capital stock of said corporation is \$200,000, which has been fully paid up; that its business plant, consisting of real estate, apparatus, utensils, and other property, is of the value of \$630,000; that "the annual product of the brewery of the petitioner, the said company, is very considerable, consisting of about thirty-five thousand four hundred barrels, of which quantity about two million bottles are bottled for domestic consumption and export, the same being distributed by exportation to Canada, Mexico, Porto Rico, Rio Janeiro, Buenos Ayres, Montevideo, and through the United States, by means of agents in San Francisco, California; Savannah, Ga.; Charleston, S. C.; Charlotte, Raleigh, N. C.; Jacksonville, Fla.; Norfolk, Richmond, Va.; Baltimore, Md.; Camden, Newark, Sea Isle, Atlantic City, N. J.; Boston, Mass.; and somewhat less than one third of the whole product is sold and consumed in the city of Philadelphia. The said company employs seventy workmen and employees, with an annual wage-list of \$54,000; that for several years last past it has been licensed as a brewer, including the year 1888; that the petitioner filed its application to the Court of Quarter Sessions of the county of Philadelphia for a renewal of its license for the year beginning the first day of June, 1889, under the provisions of the act of May 24, 1887, entitled 'An act providing for the licensing of wholesale dealers in intoxicating liquors;' that upon the seventh, eighth, and ninth days of May, 1889, a hearing was had upon the said petition, and no remonstrance or objection, so far as is known to your petitioners, or as appears by entries and records of the said

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court, was presented or made by any one to the granting of the said license." The petition then proceeds to narrate at some length an inquiry which occurred in court upon the hearing as to one of petitioner's employees having sold an article of drink called ambrosia, which appears to have been a light form of beer. We need not give this at length as it is of very little importance, and is referred to hereafter in connection with the return to the writ.

The underlying principle of this case, that is, the right of a brewer or wholesale dealer to a license, has been fully considered and decided, In re Application of Mary E. Pollard for a wholesale license. That was a certiorari to the Quarter Sessions of Allegheny county, and the opinion is now filed with this case. I do not propose to re-argue the questions there decided. I shall refer to them merely to state the points and rulings involved. We there held that in granting licenses to wholesale dealers, bottlers, and brewers under the act of May 24, 1887, P. L. 194, the Court of Quarter Sessions has not the large discretion conferred upon it by the retail act of May 13, 1887, P. L. 108; that the discretion conferred by the wholesale act is a qualified, limited discretion, and is confined to the inquiry whether the applicant for a wholesale license is a citizen of the United States, of temperate habits, and of good moral character. As no remonstrance or objection appeared upon the record of that case, alleging that the petitioner was disqualified for either of the reasons above stated, we reversed the order of the court below refusing a license, as we also did a number of other like cases submitted at the same time. It scarcely needs an argument to show the propriety of this ruling. If the record does not disclose the reason for the refusal, it would be impossible to review the action of the court below, either upon a writ of certiorari or other process, no matter how illegal or even arbitrary the action of the court might be, or how vast the interests which are thus stricken down. As to such matters a Quarter Sessions judge would sit as absolute a despot as the emperor of China.

In the case in hand, the value of the brewery, with its stock, fixtures, etc., was, as before stated, \$630,000. The refusal of a license leaves the plant and stock comparatively worthless. The former is of little use for any other purpose, while the

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latter cannot be sold without a violation of law. Under such circumstances it is but reasonable that the action of the court should be in such shape as to be reviewable here, and to show that the refusal of the license was the exercise of a sound judicial discretion expressly authorized by law. It follows from what has been said that had this case been brought here upon a writ of certiorari it would necessarily have been reversed. In this respect it differs widely from an application for a retail license, and the reason is, that in the latter instance the discretionary powers of the court are much broader; the license may be refused not only because the court regards the applicant as an unfit person to sell liquor, or, if fit, that his house is not needed in the particular neighborhood for the accommodation of strangers and travelers. The present case, however, is here upon an application for a mandamus, which involves considerations not referred to in Pollard's Case.

It is perhaps unfortunate that in cases of so much magnitude, involving very large pecuniary interests, no orderly mode of practice has been prescribed by the act of assembly or adopted by the courts. The licensing of wholesale dealers has heretofore been regarded so much as a matter of course, that but very few cases have reached this court under prior acts of assembly. In the meagre reports of the one or two cases which have reached us, it is difficult to gather the facts, and the *Per Curiam* opinions fail to show that the distinction between wholesale and retail dealers has ever been called to our attention. We do not find anywhere any allusion to the proper mode of procedure in the matter of applications for a wholesale license. This is the first case that has come up under the act of May 24, 1887, and a careful examination of said act leads us to the conclusion, as we have decided in Pollard's Case, that in the absence of any remonstrance or objection upon the record, it is the duty of the court to grant a wholesale license, and the objection must be limited to the three disqualifications already alluded to.

As a matter of practice such remonstrance or objection should be in writing and placed upon the record. In such case, the action of the court below can be reviewed here in an orderly manner. When a remonstrance is filed, it forms, with the petition, the pleadings in the case. There is then an issue

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of fact before the court, to be decided as in other cases upon the evidence. If the evidence sustains the remonstrance, it is the plain duty of the court to refuse license. That would be the exercise of a lawful judicial discretion with which this court would hesitate to interfere. When the application of the petitioner came up for consideration in the court below, there was neither remonstrance nor objection upon the record against the granting of the license. There was no issue before the court. There was no disputed question of fact for it to decide, and the act of May 24, 1887, does not confer upon the Court of Quarter Sessions the powers of a roving commission to inquire as to matters not properly before the court, and in no way connected with the petitioner's right to a brewer's license. As there was no issue before the court, it follows necessarily that there could have been no legal trial, and as there were no disputed questions of fact, there could have been no valid findings of fact. We might well, therefore, without more, discard the entire return of the learned judges of the Quarter Sessions to the writ of alternative mandamus. That we may not seem wanting in respect to them, I will proceed to its consideration. And, first, I will refer briefly to the principles of law which govern the return to such writs.

There is no form of pleading known to the law in which greater certainty is required than in a return to a writ of mandamus. It requires not only the greatest possible certainty; not merely certainty to a common intent, or certainty to a certain intent in general, but certainty to the greatest possible intent; or, as it is sometimes called, certainty to a certain intent in every particular: *King v. Mayor*, 1 Lord Raym. 559; *Bacon's Abr. Mandamus*, 1 K.; *Rex v. Liverpool*, 2 Burr. 731; *Tapping on Mandamus*, 393; *Harwood v. Marshall*, 10 Md. 452; *Reichenbach v. Ruddach*, 121 Pa. 18; *Commonwealth v. Commissioners*, 37 Pa. 237; *Rex v. Malden*, 2 Salk. 431. The reason for this strictness is, that at the common law the return could not be traversed. However that may be now, in some cases, the rule is practically the same in the present instance. We all agree that we are bound by the return to the writ, and that if it discloses a sufficient ground to refuse the license we can go no further. It follows that the common law rule as to the certainty of the return must be applied.

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Keeping this in view, and also the fact that the objections to the petitioner's application must be confined to the questions of (1) citizenship, (2) temperate habits, and (3) good moral character, I will briefly consider this return.

As preliminary the judges say:

"Before deciding said application said court deemed it to be its duty to determine whether the applicants were citizens of the United States, of temperate habits, of good moral character, and *fit persons to receive a license.*"

The first three matters were proper subjects of inquiry; if there was objection made upon either of these grounds, it was the plain duty of the court to hear the evidence and decide. As to the part of the return I have italicized, it was a matter with which the court below had nothing to do in the case of an applicant for a wholesale license.

They have nothing to do with it because the act of May 24th confers no such power upon them. It is incorporating into the wholesale act a provision of the retail act. The key to the whole difficulty may perhaps be found in this assumption of a discretion in wholesale licenses which is not found in the law, and is applicable only to the case of retailers. The fitness of a man to have a wholesale license depends upon his possessing the three qualifications before mentioned, not upon the opinion of the court upon other matters outside of them.

It appears that at the hearing in the court below the main question was as to the manufacture and sale of a mild form of beer called ambrosia, and upon the petition for the writ of alternative mandamus, the petitioner sets out at some length the testimony that was given in regard to it, with the names of the witnesses; from which it appeared that the alcoholic strength of the said beer was from one and a quarter to one and three quarters per cent only; that Dr. Henry Leffmann was then called as a witness by the court, who testified to having examined ambrosia chemically and corroborated the evidence of the petitioner as to its alcoholic strength. Much more was alleged in the petition to which it is unnecessary to refer. To this matter the court below makes return:

"The statement of testimony made in the petition of the relators is incomplete, inaccurate and misleading."

This return under all the authorities is clearly insufficient.

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See *Reichenbach v. Ruddach*, supra. In what respect was it inaccurate or misleading? Conceding that the respondents were not required to return the evidence, yet if they attempt to negative an averment in the petition by their return, it must be done with the certainty required in this form of pleading.

The return then further states :

"The court did find from the evidence, that during the year of its license then about to expire, the said company, through its chief executive officers who had been charged with the conduct of its business, had caused to be brewed an intoxicating malt liquor for the purpose of selling the same to unlicensed dealers in the city of Philadelphia, to be by the latter again sold in this city in violation of the laws of the commonwealth ; that said intoxicating malt liquor thus brewed by said company had been sold by it to numerous unlicensed dealers in the expectation that the same would be sold by them in this city in violation of law ; that through its said officers said company, by false representations as to the character of said liquor, had induced divers unlicensed dealers to purchase the same from it ; and that said liquor thus purchased had been sold in the city of Philadelphia by said unlicensed dealers."

It is to be observed that this return is entirely outside of the case. It has no bearing upon either of the three qualifications required for a wholesale dealer, and at best refers to a rambling inquiry not properly before the court. The license which the company held authorized them to manufacture and sell beer to any person who was willing to buy, licensed or unlicensed, and it must not be forgotten that the particular beer referred to was ambrosia, which as appears by the averments in the petition, and not specifically contradicted in the return, contains only a little over one per cent of alcohol. The return is, moreover, vague and uncertain ; we are not told what false representations were made by the company in regard to the character of the beer, and mere adjectives are entirely out of place in a return to a writ of alternative mandamus. Nor does this portion of the return allege a violation of any law of this commonwealth. I have dwelt upon it at greater length than was necessary, for the reason that it had evidently much to do with the action of the court below.

The return then proceeds :

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"The court did find (a) that the said company had conducted its business during the year then expiring in violation of law. It did further find (b) that said company was not a fit person to receive the license applied for; and (c) that so far as it was possible for a corporation to possess any moral character, it did not possess a good moral character."

There are three subjects referred to in this portion of the return, and for convenience I have divided them. As to the first, (a) what law has the company violated in the conduct of its business? The return does not inform us. Instead of facts we are given a mere conclusion of law. The averment is so vague that it has no force whatever. In regard to the second branch, (b) I have already said that the fitness of the company to receive a license is not in the discretion of the court below, unless from one of the three causes of disqualification before mentioned. A return generally that the applicant is not a fit person to receive a brewers' license, without specifying for what cause, is bad for uncertainty, and is, moreover, evasive. The return does say, however, (c) that "so far as it was possible for a corporation to possess any moral character, it did not possess a good moral character."

It is difficult to treat this proposition seriously. Yet it is the only matter in this return which even gives color of legality to the refusal of this license. That a corporation, an invisible, intangible thing, an artificial being created by the law, can have a character of any kind, is a novel proposition. That the learned judges below so regarded it, is evident by the qualification in their return. But the corporation has officers and a board of directors. If the court below had found upon evidence and so returned, that said officers and directors were not men of good moral character, I apprehend the return would have been sufficient. At the same time, I doubt whether any one of the learned judges of the court below would have been willing to put his name to a return that the officers and directors of this corporation were respectively men of bad moral character. The return that the corporation has not a good moral character is insensible.

There is nothing else in the return which requires comment; our conclusion is that it sets forth no valid reason why the petitioner should not be licensed.

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The former writ was alternative. The writ of peremptory mandamus is now awarded. It will probably be found unnecessary to issue it.

COMMONWEALTH, EX REL. v. WM. HILL.

ERROR TO THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY.*

Argued June 6, 1889—Decided June 28, 1889.

The provision of § 2, act of May 24, 1887, P. L. 194, that licenses of wholesale dealers in liquors "shall be granted only by the Court of Quarter Sessions of the proper county, in such manner as is provided by existing laws," is constitutional and operates to repeal the provisions of the act of April 3, 1872, P. L. 843, relating to the sale of liquors in Allegheny county, so far as they authorize such licenses to be granted by the county treasurer.

Before PAXSON, C. J., STERRETT, GREEN, CLARK, WILLIAMS, MCCOLLUM and MITCHELL, JJ.

No. 128 October Term 1889, Sup. Ct., (W. D.); court below, No. 618 June Term 1889, C. P.

On May 8, 1889, a petition was presented in the name of the commonwealth, ex relatione William F. Kaiser, which averred:

That the relator was a citizen of the United States, of temperate habits and good moral character; that on May 1, 1889, he had applied to William Hill, treasurer of Allegheny county, for the issuing of a license to him to sell vinous, spiritous, distilled, malt and brewed liquors and admixtures thereof, as a vender and wholesale dealer, in quantities not less than one quart, at his store and place of business, situate at No. 321 Fifth avenue, in the 7th ward of the city of Pittsburgh, in said county of Allegheny, under and pursuant to the provisions of

* This case, also, though belonging to the Western District, is reported here on account of its relation to the license cases preceding and following.

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the act of assembly, entitled "An act to regulate the sale of intoxicating liquors in the county of Allegheny," approved April 3, 1872, P. L. 843, and the supplement thereto, approved April 4, 1873, P. L. 516, and the supplement approved April 10, 1873, P. L. 601, and tendered the license fee of \$100, provided by said act of 1872 for a dealer of the tenth class, together with the fee of one dollar and his bond in the sum of \$2,000, as also provided for by said act of 1872, and supplements, with sureties satisfactory to said county treasurer, and in all respects complied with the provisions of the said acts regulating the issuing of licenses in Allegheny county, and demanded that a license issue to him; and that the county treasurer refused to issue a license solely because he had no legal authority to do so. The petition prayed for a mandamus to compel the county treasurer to issue the license.

Upon the filing of said petition a rule was granted upon William Hill, treasurer, to show cause why an alternative writ of mandamus should not issue.

On May 16, 1889, the respondent filed an answer admitting the facts set forth in the petition but averring that since the passage of the act of May 24, 1887, P. L. 194, entitled, "An act providing for licensing of wholesale dealers in intoxicating liquors," he had no authority or power under the law to issue any such license to sell liquor as that demanded by the relator.

On May 18, 1889, the cause having been heard upon petition and answer, the court, STOWE, P. J., ordered and adjudged "that the said petitioner has no right in law, to have the writ prayed for allowed," and the rule therefor was discharged. Thereupon the relator took this writ, specifying that the court erred in entering judgment in favor of the defendant and refusing the writ prayed for.

Mr. Morton Hunter, for the plaintiff in error:

The provision of § 2, act of May 24, 1887, P. L. 194, that "licenses shall be granted only by the Court of Quarter Sessions of the proper county, in such manner as is provided by existing laws," is in direct conflict with § 6, article III., of the constitution: *Titusville Iron Works v. Keystone Oil Co.*, 122 Pa. 727; *Barnett's App.*, 116 Pa. 486; *East Grant Street*, 121 Pa. 596; *Frost v. Cherry*, 122 Pa. 417; *Ayars' App.*, 122 Pa.

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266. It is also in conflict with § 7, article III., of the constitution: *Montgomery v. Commonwealth*, 91 Pa. 125; *Frost v. Cherry*, 122 Pa. 417; *Morrison v. Bachert*, 112 Pa. 322. It is also in conflict with § 3, article III., of the constitution: *Hatfield v. Commonwealth*, 120 Pa. 395. Being unconstitutional, the act of April 3, 1872, P. L. 843, to regulate the rule of intoxicating liquor in Allegheny county, remains in full force: *Kilgore v. Commonwealth*, 94 Pa. 495; *Commonwealth v. McCallin*, 10 W. N. 520.

OPINION, MR. CHIEF JUSTICE PAXSON:

For the reasons given in Pollard's Petition, just decided,
This judgment is affirmed.

PETITION OF OBED H. NORDSTROM.

FOR A WRIT OF MANDAMUS TO THE COURT OF QUARTER
SESSIONS OF JEFFERSON COUNTY.*

Argued October 10, 1889—Decided October 28, 1889.

[To be reported.]

1. The provision of the wholesale license act of May 24, 1887, P. L. 194, that licenses to dealers, brewers, distillers, bottlers, etc., shall be granted "in such manner as is provided by existing laws," does not incorporate into that act the discretionary powers conferred upon courts by the act of May 13, 1887, P. L. 108; Pollard's Petition, ante, 507; Prospect Brewing Co.'s Petition, ante, 523.
2. In the absence of any local law in force in Jefferson county to the contrary, the general act of March 22, 1867, P. L. 40, a supplement to the act of March 31, 1856, P. L. 200,† is in force in said county, and is to be taken as the existing law therein, referred to in the provision quoted from the said act of May 24, 1887, P. L. 194.
3. The act of March 22, 1867, P. L. 40, places wholesale licenses and retail licenses upon the same plane, and confers upon the Courts of Quar-

* This case, though belonging to the Western District, is reported here, on account of its relation to the license cases preceding.

† See the opinion of STEWART, P. J., in *Gordon's Application*, 7 Pa. C. R. 130, as to the title of the act of March 22, 1867, P. L. 40.

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ter Sessions the same discretion in granting or refusing a wholesale license as in the case of an application for a retail license: Reed's Appeal, 114 Pa. 452.

4. The Court of Quarter Sessions, in the exercise of a lawful discretion, may refuse to approve the bond accompanying an application for license, when the name of a surety upon the bond and to the jurat as to the sufficiency thereof was erased when presented, and the erasures were without explanation.
5. Wherefore, when the return to an alternative writ of mandamus sets forth as grounds for the refusal of a wholesale license in said county, such a defective bond, and that the license was refused because, in the opinion of the court, the conservation of the public peace and morals demanded it, the peremptory writ will be refused.

Before PAXSON, C. J., STERRETT, GREEN, CLARK, WILLIAMS, MCCOLLUM and MITCHELL, JJ.

No. 181 October Term 1889, Sup. Ct., (W. D.)

On August 3, 1889, the petition of Obed H. Nordstrom was presented to the justices of the Supreme Court, representing:

That he was a citizen of Jefferson county, Pennsylvania; that on January 12, 1889, he filed his petition and bond in the Court of Quarter Sessions of Jefferson county, to No. 27 February Sessions 1889, praying the said Court of Quarter Sessions of Jefferson county to grant him a wholesale liquor license in the township of Young, in said county of Jefferson, pursuant to the terms of the act of assembly of May 24, 1887. The full text of said petition and bond, and all proceedings had thereon in said court were fully set forth in a certified copy of the same. That pursuant to said petition and bond so filed, and duly advertised according to law, at a Court of Quarter Sessions, then and there holden, in and for the county of Jefferson, on February 19, 1889, the said court refused to grant him a license as prayed for; that said refusal was illegal, as he verily believed, no remonstrance or objection having been filed in said court, or objection made in said court to the granting of said license; praying that a writ of alternative mandamus be awarded directed to the judges of the said Court of Quarter Sessions, commanding them, etc.

The said writ having been awarded and served, Theophilus S. Wilson, president judge, and J. W. Foust and Henry Truman, associate judges of the Court of Quarter Sessions, made a return which in part was as follows:

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That Obed H. Nordstrom, on January 12, 1889, filed his petition and bond for a distillers' or manufacturers' license for "the sale of spirituous liquors, by measure not less than one gallon, of his own manufacture," in the township of Young, county of Jefferson :

That on February 19, 1889, the said application came on to be heard and, after due consideration it was refused and final judgment was regularly entered by the Court of Quarter Sessions of Jefferson county on the record of the said court.

1. On the hearing and consideration of the application, the court found that it was a necessary qualification for an applicant for distillers' or manufacturers' license, that the applicant should either be a distiller at the time the application was heard, or that he should have been, within a reasonable time before the hearing.

Obed H. Nordstrom was not a distiller or manufacturer of spirituous liquors on February 19, 1889, and had not been at any time since on or about February 24, 1885, at or about which time his distillery was burned and had not been rebuilt, and he had made no visible attempt towards its rebuilding or towards the further manufacture of spirituous liquors. He had a distillers' license for one year after February 28, 1888, during the currency of which, in connection with the time which elapsed after the burning of his distillery and prior to the date last named, he was afforded ample time to dispose of the small stock of his product which was left on hand at the date of the destruction of his distillery. A further license, after a period of nearly four years, was regarded by the court as unreasonable and tending to establish as a precedent an evasion of the license laws of the commonwealth.

No remonstrance was filed, but all the facts above stated were well known to the court from the record of the court in this case, and the records and testimony which were before the court, in other proceedings in the Court of Quarter Sessions and in the Court of Common Pleas, to which Obed H. Nordstrom was a party, and of which the court took judicial notice.

2. The court held that it was a prerequisite to the granting of a distillers' license, under the provisions of the 3d section of the act of March 31, 1856, and the 1st section of the act of April 20, 1858, which together constitute the "existing law"

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referred to in the act of May 24, 1887, that an applicant for a distillers' license should have had his distillery returned, classed and assessed agreeably to the provisions of the act of April 10, 1849, and, by the 6th section of the act of April 20, 1858, this "requirement" of the law should be enforced by the court. The distillery of Obed H. Nordstrom was not appraised, classed or assessed under the act of 1849, nor under any other law of the commonwealth, for either the year 1888 or the year 1889.

3. The court decided that an applicant for a distillers' license was by law required to file a bond, which should be approved by the court; and that it was the duty of the court to adjudge upon the sufficiency and regularity of the bond, and, if the bond was either insufficient or substantially irregular, to refuse the license.

Obed H. Nordstrom filed a bond at the date of the filing of his application. It was presented for the approval of the court at the hearing. The bond appeared to have been signed and sealed by Obed H. Nordstrom, Henry Ernst, T. Pantall and Jacob Hoch, in the order named.

After the signing and sealing, the name of T. Pantall appeared to have been erased. No note or explanation of this erasure appeared on the bond, nor was any evidence offered to explain it. This erasure, if made after the bond was signed by the other sureties, might have jeopardized a recovery. This was such an irregularity, when taken in connection with the additional fact that T. Pantall appeared before a justice of the peace, with the other sureties, and was qualified to the sufficiency of the bond, and his signature to the jurat was also erased, apparently after being signed by the justice, that the court, in the exercise of its judicial discretion, refused to approve the bond.

* * * * *

5. That the 2d section of the act of May 24, 1887, only authorizes courts to grant licenses to distillers as was provided by existing laws.

The 6th section of the act of April 20, 1858, was, at the time of the passage of the act of May 24, 1887, an "existing law" and as such is still in force. The provisions of that section limit the power of the court to grant distillers' license to "citizens of the United States, of temperate habits and good

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moral character." The titles to both the act of 1856 and the act of 1858 show that the intent of these acts was "to regulate the sale of intoxicating liquors." The several sections comprising both of these acts show that the "regulation" contemplated by them was to restrain the sale of intoxicating liquors in the interest of the peace and welfare of the community. The act of 1887, by its reference to and adoption of these acts re-enacts their intent. It emphasizes that intent by authorizing any person to appear as an *amicus curia* to oppose the granting of the license, without becoming a legal party or without joinder of issue as such. It extends the range of evidence and information, by authorizing an exception to the common law rules of evidence, so as to embrace petitions, remonstrances and the oral communications of counsel. In the interpretation of the evidence and information, which are admissible, and on which courts are authorized to act, in discussing the 3d section of the act of May 13, 1887, which is in substance identical with the 2d section of the act of May 24, 1887, and, on a cognate subject, in the case of *Raudenbusch's Petition*, 120 Pa. 342, your honorable court, in full recognition of the beneficent intent of the law (*PAXSON*, Justice, delivering the opinion), declared that "In order to perform this duty properly (the granting of license), the act of assembly has provided means by which the conscience of the court may be informed as to the facts; it may hear petitions, remonstrances or witnesses, and we have no doubt the court may in some instances act of its own knowledge. The mere appearance of an applicant for license, when he comes to the bar of the court, may be sufficient to satisfy the judge that he is not a fit person to keep a public house. The judge is not bound to grant a license to a man whom he knows to be a drunkard or a thief, or has actual knowledge that his house is not necessary for the public accommodation. The object of evidence in such cases is to inform the conscience of the court, so that it can act intelligently and justly in the performance of a public duty. While the act in deciding in such cases is perhaps quasi-judicial, the difference between the granting or withholding of a license, and the decision of a question between parties as to a private litigation, is manifest. Neither the petitioner nor any other person in this state has any property in the right to sell liquor."

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That the intent of the act of May 24, 1887, is of twofold character is clear. One of its purposes is to provide revenue; the other is to so regulate the sale of liquors as to secure the public peace and welfare by limiting the sale of liquors. If revenue had been the sole purpose, it would have been useless and perhaps worse than useless, to limit the right to sell to citizens of the United States, or to persons of temperate habits and good moral character; for the money of the foreigner, the intemperate or immoral man is equally as valuable as that of the best citizen. In entering judgment in this case, the Court of Quarter Sessions believed itself to be under obligation to recognize the effect that the granting of this license would be likely to have upon the public peace and morals in that community, where sufficient licenses had been granted. In so doing, in accordance with the general judicial interpretation of the acts of 1856, 1858, 1867 and 1875, it was held in this case that the Courts of Quarter Sessions were invested with a reasonable judicial discretion, not subject to review, to be exercised according to the intent of the several laws to restrain such sales of liquors as were certainly known by the court to be pernicious to the public morals and destructive of the public peace.

The place at which the liquor was proposed to be sold by this applicant is in close proximity to three large collieries, at which, at moderate estimate, from fifteen hundred to two thousand miners are employed; many of them are of foreign birth and are ignorant of the laws of the commonwealth and of the American language. Breaches of the peace have been common, and in several instances homicides among this class of people have been largely traceable to the use of intoxicating liquors. These facts are well known to the court; no remonstrance nor evidence was offered, but from knowledge possessed by the court, largely acquired from the hearing of civil and criminal causes from that locality, within the past three years, sufficient facts came to the knowledge of the court to satisfy its conscience that the conservation of the public peace and morals demanded the refusal of the license.

As, therefore, the petitioner was not a distiller at or near the time applied for his license; his distillery has not been assessed or classified; his bond was irregular; the term of the court

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at which final judgment of refusal was entered had expired; and as from the facts which were within the knowledge of the court it was satisfied that a granting of the license would be likely to promote lawlessness and immorality and endanger the public peace, your respondents respectfully decline to reconsider the judgment unless otherwise directed by your Honorable Court; but will cheerfully and promptly abide by and act upon such judgment, decree or order as your Honorable Court may see fit to make.

They, therefore, pray, etc.

Mr. C. M. Brewer, for the petitioner.

Counsel cited and relied upon Prospect Brewing Co.'s Petition, ante p. 507.

Mr. C. Z. Gordon, for the respondents.

Counsel submitted no printed briefs.

OPINION, MR. CHIEF JUSTICE PAXSON:

This was a writ of alternative mandamus, directed to the judges of the Court of Quarter Sessions of Jefferson county, commanding them to show cause why they should not grant a wholesale liquor license to the petitioner. His petition, as filed in the court below, sets forth, inter alia, "That he is an applicant for a wholesale liquor license under the terms of the act of assembly of May 24, 1887; that his residence is Young township, in the county of Jefferson; that he is a citizen of the United States; that the place for which a license is desired was formerly a U. S. bonded warehouse, near the residence of the petitioner in said county, and that the business to be conducted at said house is the sale of spirituous liquors by measure not less than one gallon, of his own manufacture," etc.

The court below refused to grant the license prayed for and in answer to our writ made return, inter alia, (a) that the petitioner was not a distiller or manufacturer of spirituous liquors at the time of the application, and had not been at any time since on or about February 24, 1885, at or about which time his distillery was burned and had not been rebuilt, nor had any visible attempt been made to rebuild it; (b) that it was a prerequisite to the granting of a distillers' license that the ap-

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plicant should have had his distillery returned, classed and assessed agreeably to the provisions of the act of April 10, 1849, which had not been done; and (c) that the bond filed by the petitioner was not in conformity with law. Upon this point the return sets forth:

"Obed H. Nordstrom filed a bond at the date of the filing of his application. It was presented for the approval of the court at the hearing. The bond appeared to have been signed and sealed by Obed H. Nordstrom, Henry Ernst, T. Pantall and Jacob Hoch, in the order named. After the signing and sealing the name of T. Pantall appeared to have been erased. No note or explanation of this erasure appeared on the bond, nor was any evidence offered to explain it. This erasure, if made after the bond was signed by the other sureties, might have jeopardized a recovery. This was such an irregularity, when taken in connection with the original fact that T. Pantall appeared before a justice of the peace with the other sureties and was qualified to the sufficiency of the bond, and that his signature to the jurat was also erased, apparently after being signed by the justice, that the court, in the exercise of its judicial discretion refused to approve the bond."

We do not think the court below was bound to approve such a bond as this. The commonwealth was entitled to a clean bond, one which upon its face did not require explanation. This bond was not so. Its mere appearance was suggestive of a law-suit. As the bond was not such as required by law, the petitioner had not complied with the statute, and he was not entitled to the license he asked for. This renders it unnecessary to discuss the other matters, (a) and (b), previously raised by the return. We might well stop here, but there are public reasons, as will be seen hereafter, why we should dispose of another and the main question presented by this record.

The learned judges make further return, in substance: That the second section of the act of May 24, 1887, only authorizes courts to grant licenses to distillers as was provided by existing laws; that by the existing laws in force at that time, the Courts of Quarter Sessions might in their discretion refuse to grant a wholesale license whenever in their judgment such license would be injurious to the public welfare, and that in the opinion of the court the conservation of the public peace

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and morals demanded the refusal of this license. The learned judges say in conclusion that they "will cheerfully and promptly abide by and act upon such judgment, decree or order as your honorable court may see fit to make."

The tone of this return is unexceptionable. There is a dignified statement of the law as the learned judges below understand it to be, without a trace of insubordination, or the assumption of superior wisdom. At the same time, they express an entire willingness to cheerfully follow our rulings in case they are mistaken as to the law. This graceful submission to the authority of this court is the more to be commended, as it is in sharp contrast to the recent utterances of one or more of the Courts of Quarter Sessions in this state in dealing with the license question.

The learned judges of the court below were right in holding that the present case is not ruled by Pollard's Case, or that of the Prospect Brewing Company, decided last June, and to be found in Weekly Notes of Cases of July 5th; [ante, pp. 507, 523.] Those cases were decided upon the local laws in force in the county of Allegheny and city of Philadelphia, which we held to be the "existing laws" referred to in the wholesale act of May 24, 1887, P. L. 194. Subsequent reflection has satisfied us of the entire soundness of that ruling. Indeed, it would be difficult to construct even a plausible argument in support of the contrary view. The attempt to write into that act the provisions of the retail act of May 13th, was so palpably erroneous, and so wide a departure from every recognized principle for the interpretation of statutes, that no further discussion of it is necessary. Hence it follows logically that the granting of wholesale licenses must be regulated by the discretion which "existing laws" conferred upon the Court of Quarter Sessions, at the time of the passage of the act of May 24th. At that time, in Allegheny county and Philadelphia there was no discretion at all, beyond requiring that the applicant was a citizen of good moral character and temperate habits. The Court of Quarter Sessions had nothing to do with granting such licenses; it was done by another officer, and the license was a matter of right upon payment of the fee. It is at least possible that when the legislature passed the wholesale act of May 24th, they overlooked the fact that licenses in Allegheny and Phila-

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delphia were regulated by local laws having no application to the rest of the state, and that those local laws, and no other, were the only "existing laws" to which the act of May 24th could possibly apply. That those "existing laws" in the localities referred to, are a great evil and have been endured for years against the protest of thousands of the best citizens of those cities, is a fact as painfully clear to us as it is to any one. We do not make the law, however; we merely interpret or declare it. This particular law was the work of the people themselves, through their duly constituted representatives. In our decisions in the cases referred to, we endeavored to declare what the law was so plainly and emphatically that the people could see exactly what they had done, and, if dissatisfied with their work, could amend the law through their legislature. We have no such power.

In Pollard's Case, and the Prospect Brewing Case we decided what was before us and nothing more. If we had gone further and declared the law as applicable to the state outside of Allegheny county and Philadelphia, we would have decided it without a case before us, and without the aid of an argument. Our opinion would have been mere dictum, and would have bound no one, not even ourselves. The wisdom of confining a decision to what is before the court, becomes daily more apparent with increased judicial experience. It never occurred to us that the professional, much less the judicial mind, could possibly construe a decision upon local laws, and which was therefore necessarily local, to have any application to the rest of the state where such local laws had no existence. In this, however, we were mistaken. We are informed that some judges throughout the state have felt themselves constrained by our decision to grant wholesale licenses, and, in one instance at least, a judge who thought our decision was general, refused a license by an act which was evidently meant for insubordination. The insubordination, however, was merely in intent, as the learned judge unconsciously followed our ruling and entered a lawful judgment without intending it. Several of the Quarter Sessions judges have, however, taken another and the correct view of this question. I have now before me a copy of the Weekly Notes of Cases for September 13, 1889, in which I find carefully prepared opinions upon

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this question by Judge Stewart of Franklin county and Judge Yerkes of Bucks county,* in each of which, while following strictly in the line of our decisions in the Philadelphia and Allegheny cases, they yet hold that said decisions have no application to the rest of the state. This clearly appears from the elaborate and able opinion of Judge Stewart, a portion of which I will take the liberty of extracting.†

“It seems to have been assumed by the courts below [Quarter Sessions of Allegheny and Philadelphia], that by existing laws was meant the earlier act of May 13, 1887, which did unquestionably, by its very terms, commit the granting of licenses very largely to their discretion. Herein error was committed, for, as is clearly shown by the opinion of the Chief Justice, the two acts have no relation to each other whatever, the one being a restraining statute, while the other, relating to wholesale licenses, was enacted for the purpose of revenue solely. It is unnecessary to quote here at length the several reasons advanced to show that it could not have been the legislative intent that the earlier act of the 13th was to be read into the later act of 24th of May. It is enough to say that the whole purpose or scope of the argument of the court is to show that by the term ‘under existing laws’ was not meant the retail act of May 13, 1887, but such other laws as related to wholesale licenses and which remained unrepealed. In the Pollard Case, the existing law was the local act of 1872, relating to Allegheny county exclusively. In the Prospect Brewing Co. Case, the existing laws were those which related to the city of Philadelphia exclusively. And in neither case did the existing law vest any discretion in the Quarter Sessions court, where the qualification of the applicant was conceded. With this plain and explicit interpretation of the act of May 24th by the Supreme Court before us, we have but to determine what was the existing law in regard to wholesale licenses in Franklin county at that time. Certainly it was not the act of May 13th : that much has been settled beyond all dispute. It could not have been the act of 1872, which determined the Pollard Case ; for this act was local in its operations, being limited to Alle-

* Perhaps, McBride's Application, 7 Pa. C. C. R. 77.

† See Gordon's Application, 7 Pa. C. C. R. 130.

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gheny county. Nor was it the law governing the granting of license in Philadelphia, under which the Prospect Brewing Co. Case was decided; for in Philadelphia, prior to the act of 1887, the courts had nothing to do with the granting of license to sell liquor, as we shall see further on. What, then, was the 'existing law' as applicable to Franklin county, and, indeed, the entire state, excepting those localities which were under the operation of special statutes?"

The learned judge then proceeds to discuss very clearly and at length the legislation upon this subject and comes to the conclusion that the "existing law" in Franklin county and throughout the state, excepting where interfered with by local statutes, was the act of March 22, 1867, P. L. 40. In this he was clearly right.* Our attention has not been called to any local law in force in Jefferson county, in regard to the granting of wholesale licenses. It follows that the general law of 1867 is in force there and is the "existing law," referred to in the act of May 24, 1887.

We do not think it necessary to discuss the act of 1867 at length. It places wholesale and retail licenses upon the same plane, and confers upon the Courts of Quarter Sessions the same discretion in granting or refusing a wholesale license as in the case of a retail license. It makes no distinction between them. This has been the uniform construction given to that act by the Courts of Quarter Sessions throughout the state for many years, with very rare exceptions if any. Even if we doubted the correctness of such construction, we would be loth to disturb a principle which had received the universal approval of so large a number of distinguished jurists. But so far from doubting it, the construction referred to was distinctly approved by this court in Reed's App., 114 Pa. 452. This and some other cases were not referred to in Pollard's Case and that of the Prospect Brewing Company, for the reason that they had no application: we were then considering the local acts in force in Allegheny county and the city of Philadelphia; not the act of 1867, which is a general law. This is too plain a matter to require further discussion.

While it is a delicate matter for this court to criticise the

* See Gordon's Application, 7 Pa. C. C. R. 130.

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act of a co-ordinate department of the government, we must be permitted to say that in our judgment the law in regard to wholesale licenses contains some very serious defects. We need refer to but one, the provision that a wholesale dealer may sell by the quart. It seems a perversion of terms to call a person who sells liquor by the quart a wholesale dealer. It is practically a retail traffic and of the worst character. But we will not pursue the matter further. The whole subject is earnestly commended to the attention of the legislature.

The peremptory mandamus is refused.

 PETITION OF MARTIN KNARR.

FOR A WRIT OF MANDAMUS TO THE COURT OF QUARTER
SESSIONS OF JEFFERSON COUNTY.*

Presented October 11, 1889—Refused October 29, 1889.

[To be reported.]

1. Where the general laws relating to the granting of licenses, to wit, the acts of March 31, 1856, P. L. 200; April 20, 1858, P. L. 365; March 22, 1867, P. L. 40, were in force prior to the act of May 24, 1887, P. L. 194, the granting or refusing of licenses to wholesale dealers in liquors continues to be within the discretion of the Court of Quarter Sessions of the proper county: Nordstrom's Petition, ante, 542.
2. Wherefore, when, from the petition for an alternative mandamus and the accompanying record, it appears that the Court of Quarter Sessions of Jefferson county heard an application for a wholesale license, and upon due consideration refused it, although no objection or remonstrance was filed of record, the writ will be refused: Pollard's Petition, ante, 507, and Prospect Brewing Co.'s Petition, ante, 523, distinguished.
3. The office of a mandamus, in such cases, is to require the performance of a judicial function: if a judge refuse or neglect to hear, the Supreme Court will enjoin upon him the performance of that duty; but, when he has heard and determined, the exercise of his discretion will not be revised unless in extreme cases: Raudenbusch's Petition, 120 Pa. 328; Commonwealth v. McLaughlin, 120 Pa. 518; Newlin's Petition, 123 Pa. 541.

* This case, also, though belonging to the Western District, is reported here, on account of its connection with the preceding license cases.

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Before PAXSON, C. J., STERRETT, GREEN, CLARK, WILLIAMS, MCCOLLUM and MITCHELL, JJ.

No. 000 October Term 1889, Sup. Ct. (W. D.)

On October 11, 1889, Martin Knarr presented a petition to the Justices of the Supreme Court representing:

That he was the lessee of a brewery and adjacent buildings, now in the borough of Punxsutawney, formerly in Young township, fully equipped and fitted for the manufacture of malt and brewed liquors; that he prepared and presented to the Court of Quarter Sessions of Jefferson county, to No. 7 February Term 1889, his application and petition for a brewers' wholesale license under the act of May 24, 1887, P. L. 194, which application and petition were in due form, as provided by the orders of the court, a certified copy of the record thereof being attached; that in said application and petition the petitioner showed to the court that he was a citizen of the United States, of temperate habits, and of good moral character; that no objection or remonstrance was made or filed to the granting of a license to the petitioner, yet notwithstanding these facts the said court on February 19, 1889, called said application up for hearing and thereupon, without assigning any reasons therefor, refused said license; that under the provisions of said act, there being no objections upon the record and no issue joined upon any matter in issue material under the law, the petitioner as a matter of right was legally entitled to have said license granted to him;—praying that a writ of alternative mandamus might be issued directed to the judges of said court, commanding them, etc.

A certified copy of the record of said application was filed with the foregoing petition.

Mr. Campbell, for the petitioner.

OPINION, MR. JUSTICE WILLIAMS:

The petitioner was an applicant for a license to sell malt and brewed liquors by the gallon and larger measure as a brewer. His application was refused by the Court of Quarter Sessions. He comes now into this court and asks a writ of mandamus requiring the judges of that court to grant his license or show cause.

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We learn from the petition and the accompanying copy of the record the following facts, about which there is no controversy or room for doubt:

1st. The petition was actually heard at the proper time by the court.

2d. After hearing the application was refused.

3d. There was no remonstrance on file, and no parties appearing to object by evidence or otherwise to the granting of the license.

The indorsement on the back of the petition is, "The within petition having been presented in open court, on due consideration thereof a license is refused." The single question presented is, whether the court had the right, after duly considering the application, to refuse it, in the exercise of a judicial discretion moved by the personal or official knowledge of the judges thereof.

The act of 1856, which may be regarded as the foundation on which our license system has been built, committed the granting and refusing of licenses to all classes of venders, to the "Court of Quarter Sessions of the proper county, except Philadelphia and Allegheny." From that time forward to the legislation of 1887, the two counties named have had a license system peculiar to them. In the rest of the state, however, the power to grant licenses has been by the acts of 1858, 1867, and their supplements, continued in the Courts of Quarter Sessions; and distillers, brewers and venders by the quart and larger measure have been required to come into the court by petition, in the same general manner as the keepers of hotels and restaurants. By the act of 1858, the courts were directed to hear "other evidence than that of the applicant," and to grant or refuse the license in accordance with the facts brought to their notice. This was merely declaratory of the duty of the courts and did not enlarge or diminish their powers. It was probably intended to set at rest all question about the duty of the court to exercise its power to hear and determine, regardless of the *prima facie* showing made by the petition on file. Substantially the same provision was repeated in the act of 1859, in that of 1867, and in the recent legislation of 1887.

In the act under which this application is made, the act of May 24, 1887, P. L. 194, the existence of this power to hear

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and determine applications for license on their merits, rather than on the face of the petitions, is recognized and regulated thus: "The said court shall fix by a rule or standing order a time at which all persons applying or making objection to applications for licenses may be heard by evidence, petition, remonstrance or counsel." Instead, therefore, of taking away or limiting the power over licenses previously residing in the courts, the act of May 24, 1887, distinctly recognizes it and makes provision for the manner in which it shall be exercised. It is very clear, therefore, that where the general laws relating to this subject have prevailed prior to 1887, the power of the Courts of Quarter Sessions has not been abridged by that act. The granting or refusal of licenses continues, therefore, to be within the discretion of "the Courts of Quarter Sessions of the proper county, except Philadelphia and Allegheny," precisely as before.

This being so why should an alternative writ issue? The duty of the judges of the court to whom this petition came was to hear and determine it. This is exactly what they have done. We have repeatedly said that the office of a mandamus is to require the performance of a judicial function, not to regulate the mental processes of a judge. If he refuses or neglects to hear, we may enjoin upon him the performance of that duty; but, when he has heard and decided, we cannot require him, unless in extreme cases, to lay his modes of reasoning and his moral standards before us, that we may revise his discretion and substitute our own.

But it is urged that the case of the Prospect Brewing Co. holds a different doctrine. We do not so understand it. That case arose in the city of Philadelphia, which prior to 1887 had its own distinct license system. The licenses were granted by a county officer whose functions seem to have been ministerial and not judicial. The same thing is true of Pollard's Case, which arose in Allegheny county. In neither of these counties had the courts any jurisdiction over the granting of licenses to sell by the quart or larger measure. When, therefore, the duty of the county officer was transferred to the courts by the act of 1887, with the direction to exercise it in accordance with "existing laws," the question was at once encountered, what are the existing laws in Philadelphia and

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Allegheny relating to the granting of wholesale licenses? The answer was, there are none except such as relate to the powers and duties of the officer whose functions were transferred by the act of 1887 to the Quarter Sessions. Outside of these two counties, the general laws, beginning with the act of 1856 and ending with that of 1867 were the "existing laws." They related to the power of the courts and regulated its exercise, and were left in full force by the act of May 24, 1887. It is thus easy to be seen that the cases of Pollard and the Prospect Brewing Company stand on the local laws of the counties from which they came.

This case comes from that part of the state where the laws existing prior to 1887 were the general laws above referred to, and it is to be decided in accordance with their provisions. But this, it may be objected, makes one rule for Philadelphia and Allegheny, and another for the rest of the state. It does not make, but it recognizes, a different rule which the legislature established nearly half a century ago, and has steadily maintained for the two counties excepted from the provisions of the act of 1856, from that provided for the rest of the state. We should be glad if the act of 1887 had provided a uniform license law to be applied, not according to previous legislation as it might be found to be in different parts of the state, but according to its own clear and self supporting provisions. It did not do so. We cannot make the law, but must declare it as we find it. This is not always a pleasant duty, and disappointment at the insufficiency of an act of assembly to meet the public expectation may, as it often does, find vent in expressions of dissatisfaction with the courts. It generally results, however, in such modifications of the statute as remove the inconsistency or correct the mistake, and so express fully the popular will.

We conclude by referring to a few of the recent utterances of this court upon the office of the writ of mandamus, and the grounds on which it will be refused: Raudenbusch's Petition, 120 Pa. 328; Newlin's Petition, 123 Pa. 541; Commonwealth v. McLaughlin, 120 Pa. 518. Upon the other question, that of the reason and scope of the rule in the cases of Pollard and the Prospect Brewing Company, we refer to the opinions in those cases, and to an opinion filed at the present term by the

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CHIEF JUSTICE in Nordstrom's Case, in which the subject is discussed with great clearness and force.

The alternative writ of mandamus is refused.

PENNA. TRAINING SCHOOL v. INDEPENDENT
INS. CO.

ERROR TO THE COURT OF COMMON PLEAS NO. 2 OF PHILA-
DELPHIA COUNTY.

Argued March 19, 1888—Decided October 7, 1889.

Where the charter of a mutual fire insurance company provided that the managers of the company, when they made an assessment upon policy holders, should "publish the same," and this notice was referred to in other parts of the incorporating act as a "public notice," and as "advertising an assessment," advertisement in a newspaper is the kind of notice required: *Lincoln v. Wright*, 23 Pa. 76, and *Sinking Springs Mut. Ins. Co. v. Hoff*, 2 W. N. 41, distinguished.

Before GORDON, C. J., PAXSON, STERRETT, GREEN, CLARK and WILLIAMS, JJ.

No 117 July Term 1886, Sup. Ct.; court below, No. * * *
March Term 1884, C. P. No. 2.

On March 20, 1884, The Pennsylvania Training School for Feeble Minded Children brought covenant on a policy of fire insurance against The Independent Mutual Fire Insurance Company of Philadelphia, Bucks and Montgomery counties.

At the trial on April 26, 1886, it appeared that the policy in suit was issued to James Devereaux in December, 1858, and was transferred to the plaintiff in March, 1879. On September 6, 1880, an assessment was made of twenty cents, and on September 5, 1881, an assessment of fourteen cents on each \$100 of the amount insured. On August 22, 1882, the insurance was suspended for non-payment of the assessments for those two years. A fire which destroyed the insured property occurred on August 30, 1883.

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The provisions of defendant company's charter: act of February 10, 1843, P. L. 13; supplements, February 12, 1844, P. L. 38; April 14, 1851, P. L. 619; February 21, 1862, P. L. 135, relating to the levying and notice of assessments are as follows:

"Section 6. . . . And when the just demand of any insurer in said company, or member thereof, shall exceed the amount of its available funds on hand, such sums as shall be necessary to pay the same shall, without unnecessary delay, be assessed by any three of the managers, appointed by the president, on the insurances, each member to pay in proportion to the amount he has insured, and publish the same, and all and every of the members of the company shall pay into the hands of the treasurer, his, her or their proportionate parts of such rates, within sixty days, after such publication as aforesaid, and in default thereof, shall be proceeded against according to the provisions of this act.

"Section 7. That in default of the payment of rates as mentioned and provided by this act, it shall be lawful for the president, managers and company to proceed and collect the same as debts of like amount are now collected by law, without stay of execution; and if any members shall refuse or neglect to pay his, her or their respective tax or assessment, for the space of sixty days from the time public notice is given of the time and place for the payment of the same, his, her or their insurance shall be suspended, and his, her or their property, shall not be protected by said company until said tax or assessment is paid; and, in the case of all delinquents, when a tax is laid, or assessment made, and the sixty days having expired, the treasurer shall have power to collect, or to appoint one or more suitable persons to complete the collections, and ten per cent may be added for compensation for collecting; public notice of this clause to be given, when advertising an assessment made, and how the same will be collected."

Other facts in the case appear in the opinion of the Supreme Court and in the charge of the court below, FELL, J., which was in part as follows:

It is not in dispute that the assessments for 1880 and 1881 were made as required by the charter. Notice of the assess-

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ments, and of the time and place of payment, was given by publication in the principal newspapers printed and circulated in the district in which the company did business, and by the posting of hand-bills in the district, and by sending postal cards to the insured whose addresses had been furnished the defendant.

The actual address of the plaintiff was a post-office in Delaware county, Pa. This address had never been given to the defendant. When the policy was sent by the plaintiff's conveyancer to the insurance company for the approval of transfer in 1879, a memorandum indorsed on the envelope requested him to send it to Joseph K. Wheeler, 2026 Chestnut street, Philadelphia, but no address of the training school has ever been furnished.

After the fire, and after the plaintiff had been informed by the secretary of the insurance company that the policy was not in force, he sent by letter to the secretary of the insurance company the amount of the assessments due. There is no evidence of the acceptance of this by the company. The evidence is that it was not accepted. It was received by the secretary, who soon after died, and was found among his papers. The treasurer or the board of directors knew nothing of it. The plaintiff did not know of the assessments of 1880 and 1881, and did not know the character of the company in which his property was insured.

The contention has been narrowed to this: Was such notice given by the defendant as is required by its charter and by-laws? The notice required is by publication and public notice. The advantage of this kind of insurance is its cheapness. Its disadvantage, the burden upon the insured of knowing when assessments are due. Actual notice is not necessary. If it were, it would be impossible to conduct the affairs of the company. While the sending of postal cards is not required by any provision of the charter or rules of the company, as a means of notice, and has been done only a few times, yet being done it might create a custom on which the insured could rely.

[If the defendant gave the notice required by the charter, by posting hand-bills and by publication in the principal newspapers published and circulated in the district in which its business was done, and also sent postal cards containing printed

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notices to the address of the insured, furnished and known to it, it did its whole duty in the matter.] ²

The jury returned a verdict in favor of the defendant. A rule for a new trial having been refused, judgment was entered on the verdict; thereupon the plaintiff took this writ, assigning as error, *inter alia*:

2. The portion of the charge embraced in [] ²

Mr. John M. Broomall, for the plaintiff in error.

Mr. Henry K. Boyer (with him *Mr. J. Quincy Hunsicker*), for the defendant in error.

OPINION, MR. JUSTICE GREEN:

The only question in this case is as to the sufficiency of the notice of assessments. A notice in proper form was published about seven times in nine different newspapers, covering the territory within which the defendant's policies were issued, and two of the newspapers were published within two miles of the building burned. There were also hand-bills posted in neighborhoods where there were policies. The charter of the company directs that the managers of the company, when they make an assessment, shall "publish the same," and that the members shall "within sixty days after such publication" pay their assessments, "and in default thereof shall be proceeded against according to the provisions of this act." The seventh section of the act provides the method of procedure in case of default, and concludes thus: "public notice of this clause to be given when advertising an assessment made and how the same will be collected." It will be seen that the notice to be given is to be a "public notice," and it is described in the act as "advertising an assessment." We think it quite plain that notice by advertisement in a newspaper is the kind of notice required by the charter to be given. That kind of notice was abundantly given all over the region of country in which the plaintiff's barn was situated. There is no requirement that a notice shall be served upon each individual member every time an assessment was levied, nor was a notice by mail prescribed. The notice was to be *public*, which is distinguished from pri-

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vate, and, in so far, the provisions of the law were complied with. Not actual notice but notice by publication is the kind of notice directed by the law.

The case of *Lincoln v. Wright*, 23 Pa. 76, has no application. It simply decides that a statement of the occurrence of a fact in a newspaper as a matter of news is not notice in the legal sense to anybody. In the case of *Sinking Springs Ins. Co. v. Hoff*, 2 W. N. 41, the question whether publication in a newspaper alone of an assessment upon the premium notes of the members was sufficient, was not decided and was so expressly stated. It was only decided that the forfeiture of the policy by the directors was premature, and that notice of the *forfeiture* by publication in a newspaper was not actual notice. There was a provision in the charter for forfeiture for non-payment of assessments, but there was no provision for giving notice of the forfeiture to members. There was therefore nothing which dispensed with the necessity for actual notice. The charter of the defendant, in the present case, contains a provision in regard to the forfeiture, or suspension, rather, of the policies of delinquent members, which is not contained in the charter of *Sinking Springs Company*. It is found in the seventh section, and is in these words: "And if any member shall refuse or neglect to pay his, her or their respective tax or assessment for the space of sixty days from the time public notice is given of the time and place of the payment of the same, his, her or their insurance shall be suspended," etc. It will be seen that the suspension of the policy follows non-payment by force of the law, and without any act of the directors as in the *Sinking Springs Case*. It is therefore only necessary to know whether the default for sixty days has transpired from the time the "public notice" of the time and place of the payment of the assessment was given. As this default had very largely exceeded the sixty days, the suspension of the policy followed by force of the charter.

There was no actual payment of the assessments after the fire, which was received by the company. The money was sent to the secretary who replied that when he heard from the attorney of the company he would more fully answer the letter of the plaintiff's treasurer. The money was never paid to the company and was not even accepted by the secretary. He died

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soon after and the money and letter of the plaintiff's treasurer were found among his papers after his death.

Judgment affirmed.

W. C. F. REICHENBACH ET AL. v. MARY G. RUD-
DACH.

ERROR TO THE COURT OF COMMON PLEAS NO. 1 OF PHILA-
DELPHIA COUNTY.

Argued January 10, 1889—Decided October 7, 1889.

[To be reported.]

- (a) In an issue devisavit vel non, raising the questions of testamentary capacity and undue influence, after testimony sustaining the alleged will, there was much testimony tending to establish that though the deceased in early life was of excellent mind, culture and deportment, yet in his later years he was addicted to drunkenness, profligacy and sexual excesses:
- (b) That within three months before the alleged will was executed, his mental powers had become so impaired by his profligate habits that he was then in such a condition of chronic alcoholic insanity, with dementia, that, in the judgment of medical witnesses and experts, it was almost impossible there should be a recovery with mental capacity:
- (c) That for several years, and up to the time when she became his wife, the deceased had been living with the sole beneficiary under his will, as his mistress; that the marriage was suggested to him by another and was performed in the house of the beneficiary, where the will was executed on the second day thereafter, and where the testator died on the third day.
1. The record of a hospital for the insane, indicating that the testator's father, thirty-eight years before, was admitted to the hospital because of intemperance, continued for six months and resulting in melancholia, was inadmissible, when there was no proof or offer of proof that the species of melancholia with which the father was affected was transmissible by inheritance.
 2. It was error, under the testimony in the case, to charge the jury in affirmance of a point by the proponent, that there was no sufficient evidence of general insanity of the deceased, and that therefore the burden of proof was upon the contestants to show the existence of testamentary capacity at the very moment of the execution of the will.
 3. The testimony upon the subject of the previous condition of the testator

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should have been submitted to the jury, with instructions that if it failed to satisfy them that there was a condition of general insanity at any time before the will was made, then the burden of proof of testamentary incapacity at the time of execution was on the contestants.

4. The language of a point to the effect that if the jury found from all the evidence in the case that there was such imbecility of intellect as "rendered the testator incapable of appreciating, knowing, remembering, and calling to mind the value and extent of his property, at the time of making and executing said will," was entirely too broad.
5. A disposing mind and memory is one in which the testator is shown to have had, at the making and execution of a last will, a full and intelligent consciousness of the nature and effect of the act he was engaged in; a full knowledge of the property he possessed, and an understanding of the disposition he wished to make of it by the will, and of the persons and objects he desired to participate in his bounty.
6. It was error to refuse instruction requested, that the jury might take into consideration "the state and condition of mind of the testator," at the time of making and executing the will, "the condition and relative situation of the testator and the proponent, the situation, surroundings, and condition of the testator himself, the nature and extent of his property, all the circumstances under which the will was made and the provisions of the will itself."
7. While in the present case, the fact that a marriage had taken place prior to the will, relieved the proponent from the rule of *Dean v. Negley*, 41 Pa. 312, as to undue influence of a mistress, it did not relieve the testamentary act from the imputation of a continuance and a present exertion of an undue influence, if the jury in view of all the facts inclined to such a belief.
8. It is not true, in law, that one who has merely "given indications of mental unsoundness" is not at liberty to do what he likes with his own, or that in such case "every sign of partiality or injustice must be viewed with strong suspicion;" indications of insanity do not constitute testamentary incapacity, and Dr. Ray's report in *Pidcock v. Potter*, 68 Pa. 353, is not the opinion of the court.
9. There was no relevancy or legal propriety in suggesting by a point a limit of time within which a radical change from a condition of testamentary incapacity might not take place, when there was abundance of testimony as to what the actual condition of the testator was at the end of that period, and ample opportunity to deliver direct testimony on the subject.
10. If the testimony upon one side of a controverted question of fact is made prominent and conspicuous in the charge to a jury, common fairness requires that equal prominence should be given to opposing testimony having a contrary tendency, and the giving of such undue prominence to one side of the cause is ground for reversal.
11. Averments of testamentary incapacity or undue influence need not be established by positive evidence as distinguished from circumstantial; it was error therefore, to charge in this case that the presumption, where

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a will was duly executed by a person of full age, that he was competent and not unduly influenced, must be overcome, not by doubtful testimony, but by positive evidence.

Before PAXSON, C. J., STERRETT, GREEN, CLARK, WILLIAMS, MCCOLLUM and MITCHELL, JJ.

No. 150 July Term 1887, Sup. Ct.; court below, No. 490 December Term 1885, C. P. No. 1.

On January 2, 1886, there was filed a precept for an issue from the register of wills, to determine: (1) whether or not at the time of the execution of a certain alleged will, dated November 15, 1884, William H. Ruddach, the testator, since deceased, was of sound and disposing mind, memory and understanding; and (2) whether or not the said alleged will was made by reason of undue influence exercised over the mind of said William H. Ruddach, deceased. The issue was in the ordinary form, and Mary G. Ruddach, executrix of said alleged will was made plaintiff, and William C. F. Reichenbach, a legatee and devisee under an alleged will of a prior date, George J. Ruddach, Mary Robinson, Edmund Ruddach, and a number of others, were made defendants.

At the trial on February 9, 1887, the plaintiff called the subscribing witnesses, four in number. The first two of them proved the execution of the will, dated November 15, 1884, and stated, in reply to questions propounded by plaintiff's counsel, that at the time Dr. Ruddach executed the will he was of sound and disposing mind, memory and understanding. These witnesses were then subjected to a rigid cross-examination by the defendants' counsel upon the subject of the testator's testamentary capacity. The plaintiff then called the other two subscribing witnesses and after proving the execution of the will, rested. Thereupon the defendants' counsel gave notice that as the plaintiff had undertaken to prove the affirmative of the issue upon the question of testamentary capacity, and had examined two of the subscribing witnesses but had not deemed it wise to examine the other subscribing witnesses upon that subject, the defendants would object to the re-opening of the plaintiff's case thereon at a later date. The next morning the question was ruled:

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By the court, BIDDLE, J.:

I did not decide this question yesterday, not from any doubt in my own mind, but because the hour of adjournment had arrived, and I wanted to read more carefully the decision of my own court in this case. I have had the advantage of reading the opinion referred to very carefully since, and I have had the additional very great advantage of consulting my colleague, Judge ALLISON, who delivered the opinion of the court, that I might find from him whether he had any different understanding of what the court decided than I had. I find that he entirely concurs with me. The theory that we promulgated then was, that the proper mode of trying a case of this sort was that the party plaintiff to such action must of necessity, it seems to us, be the party who seeks to establish the will, which is accomplished when the due and formal execution of the writing has been proved by the testimony of the subscribing witnesses, or by proving their signatures if they are dead or cannot be found, or if there be no subscribing witnesses, then by due proof by at least two witnesses of the signature of the testator. We hold that the proponent of the will has a right to prove the will in that way, and to rest, and that the defendant has no right to cross-examination except upon the due execution of the instrument. To our mind, it is exactly like a promissory note or a mortgage. If you choose to produce your promissory note, and prove the execution of the note and rest, that is all you have to do. If, instead of doing that, however, you choose to go into the consideration of the note, and then the defendant, alleging that it is an accommodation note, goes into his evidence on that subject, you are debarred from going back again, after that testimony has been delivered, to further proof of the original consideration. We know perfectly well that that is the undoubted rule in regard to the admission of evidence. You seem to think that there is an exception in this case, because in the register's office, there is some form by which a man expresses his opinion as to the sanity of a testator. I do not think that has anything to do with the present question; but, admitting that it has, then your position, as I understand it, is that it is your duty not only to prove the formal execution of the will but the sanity of the testator. That being your position, if it is your duty to prove

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the sanity, you must go on and prove it. Is there any law which decides that you can partially prove, and then admit the defence, and go on and subsequently attempt to prove it? If the obligation is upon you, as you seem to think, to prove sanity, then you must do it at the time you propose your will. I do not think that it is at all incumbent upon you; but if you choose to do it, it is your own choice, and, of course, you will have to abide by it. I have never, myself, been able to see the mystery of trying a will case more than any other issue which we try here from morning to night. It is subject to exactly the same rules, and therefore, if you desire to add anything more, I would not consider the case closed as against you. I do not think you are bound by the fact that you closed your case, as the other side very fairly gave you notice what the effect of it would be, and I think if you desire to re-open and give all the evidence that you have on that point, I shall cheerfully acquiesce in it.

.The plaintiff's counsel then asked permission to withdraw the questions put to their two subscribing witnesses upon the testamentary capacity of the testator, on the ground that they were merely formal. This the court refused, referring to the protracted cross-examination upon the subject which had resulted, and required, under exception sealed, that plaintiff put in the whole of her proof in chief upon the question of testamentary capacity.

The plaintiff then called a large number of witnesses whose testimony, it was claimed, established the following facts:

Dr. Wm. H. Ruddach, whose will was the subject of controversy, was born October 15, 1825. From his youth he cared nothing for society, avoiding even the social gatherings at his father's house. He was moody and uncommunicative, except when in his cups. In these respects he was eccentric and so continued until his death. He became acquainted with Mary G. Greusser, the plaintiff in the issue, when she was but a girl, and wanted to marry her twenty years before the marriage actually took place, and before she married any other person, but she refused him and was married to a Mr. Dixon. Because of this Dr. Ruddach took to drinking, and from time to time went upon protracted periods of intoxication. When sober, he would speak of the plaintiff in the highest terms, and frequently said

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that if she had married him he would never have become dissipated; he also said repeatedly that he would never marry any other person.

Miss Greusser's marriage with Mr. Dixon was an unhappy one, and after they lived for a short time together, she left him and returned to her mother's home. Thenceforward she supported herself as a saleswoman in a store. Shortly after her return home, Dr. Ruddach endeavored to renew his attentions toward her, and urged her to obtain a divorce from Mr. Dixon and to marry him. Being a Catholic, she refused the suggestion, as the law of her Church forbade it. During this time, which was almost continuous for ten or fifteen years before his death, he was boarding with her mother, and would meet her at the store where she was employed and escort her to her home. He frequently told others of his wishes in this regard, and tried to obtain their assistance in his behalf.

On January 26, 1884, Dr. Ruddach made a will, in which a relative, Nicholas Huppman, was the principal beneficiary. Huppman died on March 21, 1884, and on March 24th, Dr. Ruddach executed a codicil to said will reciting the fact and constituting W. C. F. Reichenbach, one of the defendants in this issue, his principal beneficiary. At the execution of that will and codicil, Dr. Ruddach, as testified by the subscribing witnesses thereto, was entirely competent.

At April Term, 1884, of the Sessions, Dr. Ruddach was a member of the grand jury of the county, attended every day of its sessions, nineteen in all, and was thoroughly careful, competent and intelligent in all that he did. In May, 1884, he was arrested upon the charge of procuring an abortion, and bound over to appear at court. This matter was a cause of much annoyance to him, and he went off on a debauch. On July 3, 1884, the indictment was returned, not a true bill, by the grand jury. On the same day Dr. Ruddach voluntarily went to St Joseph's Hospital.

At that place, in keeping, as was claimed, with his previous conduct, he refused to have much to say to the attendants, or to the physician, Dr. Cruice; but whenever his friends called, he recognized them and conversed with them intelligently about past and present events, about business, his investments, and other matters of interest to him. While at the hospital,

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he received liquor and opiates. When he thought he had sufficiently recovered from his debauch, he voluntarily left the hospital, and on July 17, 1884, returned to his boarding house. When he reached home, Dr. Price, his attending physician, visited him and found him perfectly intelligent and was told by him what medicine he could, and what he could not take. Between that time and August 26, 1884, he remained boarding with plaintiff's mother, and went about his business, consulting with Messrs. Sylvester, who attended to his investments, collecting and depositing his income, and drawing such moneys as he needed from time to time.

Late at night on August 26, 1884, he went alone to the Union street station house, and requested to be allowed to stay there during the night. At that time he had been taking chloral or opiates. He was accused of taking chloral, but denied it, and said he had been taking opiates. The opiates had stupefied him. The lieutenant of police conceived the idea that he ought to be confined, and had him examined by two physicians. The physicians refused to certify that they thought him insane, but recommended that he go to Burn Brae. He refused to go to Burn Brae, and sent for Dr. Price, his physician, giving his name and address accurately. Dr. Price stated, when he came, that he needed rest only, and absence from drink, and it was recommended that he be taken to the West Philadelphia branch of the Pennsylvania Hospital. He consented to go as a voluntary patient, to leave when he pleased, and went there on August 27, 1884.

While at this hospital, Dr. Ruddach would have but little to say to the attendants, but conversed freely and intelligently with his friends. Dr. S. Preston Jones was the physician in charge, but saw but little of him. While there he was given liquor and opiates. He left the hospital September 2, 1884, and returned to his boarding house. On his way returning he conversed intelligently about his condition. Subsequently he called up of himself the sum which had been paid for the carriage, and paid over the amount.

Mr. Dixon had died on July 4, 1884. Soon after, Dr. Ruddach renewed his importunities that the plaintiff would marry him. She refused on account of his illness, desiring that he would wait until he got well. He urged her for his sake to

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marry him, telling her that she would wait until it was too late. At this time he desired to execute a will in favor of the plaintiff, and requested the Messrs. Sylvester to call and prepare it, but out of caution and knowing his previous dissolute life and believing there would be a law-suit after his death, they ignored his request, though they did not doubt his entire competency. The plaintiff not acceding to his request for an immediate marriage, he went to the Delaware House on September 20, 1884. While there he was taking chloral and opiates. With the other boarders he would have no intimacy, but with the friends that called and with his physician he was always intelligent. To avoid requests to give or loan money, he told that he was poor. He left the Delaware House on September 24, 1884, returned to his boarding house, and remained there as at his home until his death. He was out and around visiting friends and neighbors, and receiving return visits. He conversed intelligently, transacted his usual business, and gave minute and careful directions about his investments and securities.

He had frequently spoken to Wm. D. Fortin about getting some one to draw his will for him, but Mr. Fortin, thinking there was no hurry, did not concern himself about it, but about November 1, 1884, he spoke to Mr. J. Alexander Simpson, a member of the bar, on the subject, and on November 11, 1884, requested Mr. Simpson to go to Dr. Ruddach's house for that purpose. On November 13th, Mr. Simpson and Mr. Fortin went together to call upon Dr. Ruddach. Mr. Simpson had never met Dr. Ruddach, and on the way he inferred from some remark made by Dr. Fortin that the relations between Dr. Ruddach and the plaintiff were illicit. After the introduction, Dr. Ruddach asked Mr. Simpson if he called professionally. Mr. Simpson said he did, and that the first advice he had to give was that they should get married. Dr. Ruddach said that was just what he had been wanting for some time. A number of things occurred at the interview in all which Dr. Ruddach acted and conversed intelligently. The plaintiff consented to the marriage, and the ceremony was performed in the presence of six witnesses. Afterwards, when all had left the room, Dr. Ruddach gave directions to Mr. Simpson for the preparation of his will, desiring that all his property be left to

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his wife. Between that date and the execution of the will, he told a number of visitors of his marriage, and that he felt much better by reason thereof, and that he was expecting Mr. Simpson to come down with the will. He sent Mr. Fortin to hurry Mr. Simpson up. On November 15, 1884, Mr. Simpson called with the will; witnesses were sent for; the plaintiff was asked to leave the room, and the will was distinctly read to Dr. Ruddach in the presence of the four witnesses. He said it was just what he wanted and it was then executed and attested. After this, he told to several persons that he had made his will, and that his mind was at rest by reason thereof. The next day a relapse came, and he died. He was conscious to the last, spoke affectionately of his wife, and much regretted his past life.

During the time of his illness, he was visited by his friends and neighbors, and by but one relative, Mr. Wm. A. Ruddach, who against his interest testified that he was entirely competent. He refused to permit the plaintiff to write to his other relatives during his illness. He had unbounded confidence in the plaintiff, and frequently said he had intrusted her with large sums of money, as high as \$60,000, and had never missed a cent of it. Except when intoxicated, and then only on a few occasions, he spoke of her in the highest terms. Dr. Price, the attending physician, visited him sixty-nine times from July 17, 1884, to the time of his death, and said that at all times he was competent to make a will, and that the effect of his past excesses was to injure the internal organs only, and not to affect his mind; that when not in liquor his mind was perfectly clear, and that towards the last, by reason of the supply of liquor being stopped, he was always clear and intelligent.

The case in chief of the plaintiff having closed, early in the defendants' case certain records of the Pennsylvania Hospital containing entries in regard to David J. Ruddach were produced:

Mr. Ashhurst: We propose to prove by the records of the Pennsylvania Hospital for the Insane that David J. Ruddach, the father of William H. Ruddach, the decedent, was committed to that hospital in 1849 as being insane, and that he died there, after a residence of two months; the said records containing the date of his admission, at whose application he was admitted, the cause of his confinement there and the history of the case,

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being minutes of the corporation and ancient documents contemporaneously kept more than thirty years ago; the purpose of this offer being to show that the decedent derived an insane taint from an insane father.

The entries offered were as follows: "David J. Ruddach, merchant; admitted 1st month, 18, 1849; aged 55, native of Philadelphia; 1st attack, cause intemperance; duration of disease before admission, six months; form of mental disease, melancholia." "David J. Ruddach discharged 3d month, 10, 1849; time of residence in hospital, 1 month 20 days; cause of discharge, death."

By the court: I do not see upon what ground the evidence is admissible in the case. There have been no grounds laid for its admission, and, if it were admitted, there would be no opportunity given to the other side for an investigation as to the circumstances of the case in order to ascertain whether David J. Ruddach, like his son, William H. Ruddach, had been a drunkard or dissipated man, or whether it was a case of hereditary insanity. I, therefore, sustain the objection and overrule the offer of the testimony; exception.¹

The defendants then proceeded to adduce testimony from which it was claimed the following facts were established:

Dr. Ruddach was the son of David J. Ruddach, an old and well known merchant of the city. He received a careful school and collegiate education. While he was all his life somewhat eccentric and peculiar in his manner, he was noted for his gentlemanly deportment, and a certain elegance and old-fashioned courtesy of demeanor. By his father's death in 1849, he passed at once into the possession of a large inheritance, and soon afterward commenced a career of dissipation, but for many years, despite his dissolute habits, he retained the manners, appearance and behavior of the cultured gentleman. In the last years of his life, however, he sank into a condition of great physical and moral degradation. At his death, he left upwards of \$50,000 of personal property, and real estate of which he was the owner in fee, of an annual rental value of \$3,200. He left no relations on his father's side nearer than cousins. On his mother's side he left uncles, aunts and cousins, residing for the most part in Baltimore. He had little intercourse or intimacy with his paternal relatives, but with his

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relations on his mother's side, residing in Baltimore, he had always kept up affectionate intercourse, particularly with his aunt, Mrs. Huppman and her children. Her son, his cousin, Nicholas Huppman, was his special and close friend in the family, and he had often planned the adoption of a son of Mr. Huppman as his heir. His affairs for many years, especially the collections of his rents, had been in the hands of Mr. Anthony Snyder. Other real estate investments had been attended to for him by the Messrs. Sylvester, and Mr. D. R. Patterson had been his legal adviser as to such matters. He was attached to W. C. F. Reichenbach, one of the defendants, the son of his mother's housekeeper.

For many years prior to 1883 he had indulged in hard drinking and sexual excesses, and was also addicted to an undue use of drugs, such as chloral, etc. In the spring and summer of 1883, he showed moral deterioration and a change of habits, by open and notorious association with women of a low character, and by a general selection of companions of a different and lower class than that of those for whose intimacy his education and earlier habits had fitted him. In a letter to Nicholas Huppman he acknowledged that he was "morally, mentally and physically broken up." His language and behavior were violent, profane, boisterous, unnatural and disconnected; he was subject to delusions, both as to loss of sight, which was imaginary, and as to being followed and watched by unknown persons. His dress was slovenly, his appetite ravenous and ungovernable, and his manners at table and elsewhere unseemly. Notwithstanding, he seemed to retain in the strongest form his affection for his cousin Nicholas and the little boy, and toward the close of 1883 he made a will, which was formally executed on January 24, 1883, and in which after certain provisions for his friend and agent Mr. Snyder, and a cousin, Miss Frazier, an elderly lady who had long resided with his mother, and the Old Men's Home, the residue of his estate was given to Nicholas Huppman, subject to a gift of \$15,000 to Wm. C. F. Reichenbach. Mr. Huppman died March 21, 1884, and on March 24th, Dr. Ruddach executed a codicil to his will adverting to that fact and substituting Mr. Reichenbach as his residuary legatee and devisee.

Dr. Ruddach had for many years been more or less intimate

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with Mrs. Mary F. Dixon, whose husband was separated from her until his death in July, 1884. Witnesses for the defendant testified to Dr. Ruddach's complaints of her unkind treatment; her extravagance; her desire to induce him to marry her, to which he would never consent, and his desire to be rid of her.

Between the summer of 1883 and May 1884, he drank and indulged in sexual excesses even more than ever before, having as many as thirteen mistresses and drinking as many as fifty glasses of liquor a day. In May he was arrested and bound over for bastardy and abortion. Though at a large outlay he had settled the prosecution, the charge greatly worried him, and the pain and distress of mind continued afterwards. In the latter part of June, 1884, he told an old friend that he had been robbed of \$75,000 at the trust company, and that he had been hunted to death by a woman whom he characterized by a profane and opprobrious epithet. He was not then in liquor, but in a wild state; clothes disordered and uncared for, absolutely changed from his former self.

On July 3, 1884, he was taken by a friend to St. Joseph's Hospital. He was then much emaciated and broken, and was suffering from chronic diarrhea. The diarrhea continued during his entire stay at the hospital, which he left on July 17th. The physician in charge testified that he was perfectly imbecile, and showed no indications of mental improvement. He gave no intelligent replies to the physicians and attendants, save that he had relatives in Baltimore. He did not dress or undress himself. In trying, at times, he would put his feet into his coat sleeves, his coat on over his shirt and drawers, without trousers, and put on his vest and long coat inside out.

On August 26, 1884, he went unaccompanied to a police station, to give himself up; he claimed that he was poor and had lost all his money, although at the time he had upwards of \$1,100 in bank bills on his person. He allowed his money to be taken from him by the police lieutenant without objection, and was unable to give intelligent replies to the questions put to him by the officer, whom he knew and recognized. Two physicians examined him at the officer's request, and gave a certificate for his admission to the Burn Brae Institution for the Insane, but on August 27th he was taken to the Pennsylvania Hospital for the Insane.

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The physicians in charge there stated that during his entire stay at this hospital he was insane, suffering from dementia, which apparently had been coming on him a long time. He was unable to give intelligent replies to the questions of physicians and attendants. At times he was noisy and boisterous. He did not sleep. He complained of being poor. He stood at times looking at the ceiling, imagining he saw persons there who wanted to shoot him, and would mutter unintelligibly. The physicians were positive he was not suffering from immediate alcoholism or delirium tremens, but was in a morbid condition, physical, moral and mental degradation and collapse, the result of his long career of drinking and dissipation.

On September 2, 1884, he was taken from the hospital by the plaintiff and her friends. On September 4th, he removed from his box in the Fidelity Company's office, mortgages, stocks, coupon bonds to the value of \$10,000, and took them to the plaintiff's house and handed them to her, saying that they belonged to her, and that if she could not make use of them, to burn them up before she gave them up. On September 20th, he went to the Delaware Hotel. While there he imagined persons were hunting for him, to kidnap or arrest him; that he was poor and had lost all his money; complained of cold while the weather was warm, and tried to warm himself by a heater where there was no fire, etc., etc. From being a man of strong will he had become plastic and docile, and readily obeyed directions given him. On September 24th, he left the Delaware Hotel in the company of friends, who told him they would try and obtain employment for him in the business of one of them, a pawnbroker. He was taken to the house of the plaintiff where he remained until he died. Medical experts testified that in their opinions it was a moral impossibility that he could have recovered sufficiently to become capable of executing a will or transacting any business.

Towards the close of defendant's case, they called Dr. S. Preston Jones, who succeeded Dr. Kirkbride as chief of the Pennsylvania Hospital, and proved Dr. Kirkbride's handwriting to certain entries in the books of the institution formerly produced:

Mr. Ashhurst: I offer in evidence the entry in the book in the handwriting of Dr. Kirkbride, which has been identified

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by the witness, relating to the admission of David J. Ruddach, the father of Dr. William H. Ruddach, into that institution.

Objected to.

By the court: Objection sustained; exception.²

At the close of the case on the testimony, the court, BIDDLE, J., charged the jury:

It appears that on Saturday, the fifteenth day of November, 1884, Dr. William Ruddach executed a paper, which it is here contended was his last will and testament. That this paper was executed in the manner prescribed by our act of assembly cannot be, and is not controverted. It was signed by him at the end thereof, and is witnessed by four subscribing witnesses, which are two more than the act requires, so that its formal execution may be said to be established. It is contended, however, that, at the time he signed this paper, he was not of sound and disposing mind, memory and understanding; and, second, that, at the time he signed it, he was unduly influenced in the performance of that act. If you should find both or either one of these allegations to be true, it would invalidate the instrument, although all the formalities necessary to its execution should have been observed.

[The presumption, where a will is duly executed by a person of full age, is, that the testator is competent to make a will, and that he was not unduly influenced in the making of it. This must be overcome, not by doubtful testimony, but by positive evidence.]¹⁷ A man of sound mind and disposing memory is one who has a full and intelligent knowledge of the act he is engaged in, a full knowledge of the property he possesses, and an intelligent perception and understanding of the disposition he desires to make of it, and of the persons and objects he desires shall be the recipients of his bounty. Or, to sum up the whole in the most simple and intelligent form, were his mind and memory sufficiently sound to enable him to know and to understand the business in which he was engaged at the time he executed the will?

Undue influence does not mean, legally, that influence which is acquired over a testator by acts of kindness or other acts of that character calculated to inspire affection and confidence. Neither does honest advice or suggestion. And it has even

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been held by our Supreme Court that one has a right, by fair argument or persuasion, to induce another to make a will in his favor. To constitute undue influence, in the language of Judge WOODWARD: "There must be a present constraint operating on the mind of the testator in the very act of making the instrument, and there must be some evidence tending legitimately to prove that some fraud had been practiced, at the time of making the will, or that some misrepresentation had been made, or that some physical or moral constraint had been employed, such as to destroy his free agency. Neither moral nor physical constraint is to be inferred from mental weakness alone. That undue influence which suffices to destroy an alleged will, is distinct from weakness and has no necessary connection with it." These principles, says Judge THOMPSON, are fully supported by the best authorities.

Dr. Ruddach, it appears by the will in question here, has left the whole of his property to his wife. He does not appear to have had any direct descendants, and those here disputing it are collateral relatives and legatees claiming under a former will. Mr. Reichenbach, who has been called a foster-brother in the discussion of the case, does not occupy that position, according to the usual understanding of that phrase. Foster-brothers are children of different parents, suckled by the same woman. Mr. Reichenbach was simply the son of the housekeeper of Dr. Ruddach's mother, and was brought up in the family.

That a man who marries should change any will made before that event, is of course very usual. In fact, if he does not do so, and dies, the widow can claim under the intestate act. The will of a single woman is revoked absolutely by her subsequent marriage. In the present case, Dr. Ruddach was married on the 18th of November, 1884, made his will on the 15th, and died on the 16th. The nearness of these events is naturally calculated to excite remark and to require explanation. The witnesses for the plaintiff explain it by saying that the person whom the doctor married had been known to him for many years, and that their earlier union was only prevented by the fact that her husband, who had deserted her, was still living; that being a Catholic, she was unwilling to avail herself of the law to obtain a divorce; that in July preceding

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Dr. Ruddach's death, her husband had died, and their union was then postponed only on account of Dr. Ruddach's illness, and it was the suggestion of Mr. Simpson, who was sent for by the doctor to make his will, that it had better be preceded by the marriage. That the marriage ceremony was gone through with was testified to by the magistrate who performed it in the presence of Mr. and Mrs. Butcher, Peter Daley, Mr. Kessler and Mr. Simpson, Sr., who have all sworn that Dr. Ruddach was entirely conscious of what was going on and intelligently answered the questions which were addressed to him, and that neither the physician who attended him, nor any of his friends, anticipated that he would die so soon after it.

The plaintiff here, who represents the will, has not chosen to rely exclusively upon the presumption arising from the formal execution of the paper, but has also produced affirmative testimony to establish the fact that the testator was of sound disposing mind, memory and understanding at the time that he signed it. The will was an extremely simple one. To establish not only the execution of the will, but the condition of the testator's mind, the plaintiff has called Mr. J. Alexander Simpson, the lawyer who drew and witnessed the will, and Peter Daley, Nicholas Kessler and Mrs. Butcher, who appear as subscribing witnesses. They swear positively that the full contents of the will were made known to Dr. Ruddach, and that he was, in their opinion, in a condition of mind fully to understand it. Their cross-examination has been elaborate and exhaustive, and their previous testimony before the register gone over, and it is for you to say whether anything has been developed to cause you to believe that their testimony has been invalidated.

In addition to the subscribing witnesses to the will a number of others have been called, who have had a more or less extended acquaintance with or friendship with the doctor, and who, although they admit that he was more or less addicted to the use of liquor, do not consider that it ever disqualified him from the performance of the ordinary duties of life, or was ever carried to such an excess as to make him incapable of taking care of himself. Their reasons for this opinion have been thoroughly investigated, and it is for you to say whether it has shaken the faith in the justice of these conclusions. The mere

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fact that a man is addicted to drinking does not of itself disqualify him from making a will, if you believe that, at the time he made it, he was in a condition of mind to understand clearly the nature of the business in which he was engaged. Liquor affects people very differently, the capacity to resist its influence being very great in some and very small in others. Among the most important of these witnesses was of course Dr. Mordecai Price, a graduate of the University of Pennsylvania, and a practitioner of seventeen years' standing. He was called to attend Dr. Ruddach by Mr. Joseph Butcher. His attendance commenced on the 17th of July, 1884, and only ended with Dr. Ruddach's death. He testifies that, although he was a sick man, "his mind was always perfectly clear when you aroused him, even at his weakest and worst period; that towards the latter part of his life, he was freer from pain than before." These are the main features of the plaintiff's case, and if you should consider them established, would certainly constitute a valid disposition of his property.

The defence, as opened to you in this case, was, that it would be shown to you that Dr. Ruddach, so far from having any regard or esteem for Mrs. Dixon, whom he married, "hated, abhorred and detested her;" that the will devising to her this property was an infamous fraud perpetrated in a den in the lowest quarter of the city; that it was concocted by this woman, a negro politician, and a lawyer, Mr. Simpson, assisted by Mr. Daley, Mr. Kessler and an apostate cousin.

Denunciatory declamation is always very striking when well delivered, but in a court of justice, unless justified by adequate testimony it is entitled to no consideration. Can you find, then, in the present case, anything from the beginning to the end of it which satisfies your mind that Dr. Ruddach "hated, abhorred and detested" Mrs. Dixon? Is not the great weight of the testimony the other way?

It is quite remarkable to my mind, that in Dr. Ruddach's free and unconcealed reflections on the women he consorted with, she never seems to have been included in the same category with them. It is not pretended that she was one of the thirteen whom he numbered, or that she was one of the eight for whom Mr. Theodore H. Broughton furnished liquor by order of a gentleman he deemed out of his mind. Her appear-

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ance seemed always to be to protect and guard him, and whatever he ever said disrespectful of her, struck me more as the petulance of one who resented anything like interference with his vices. [That she was always kind, attentive and devoted to him, seems to me to have been overwhelmingly established in this case.]¹⁹ She performed the most menial services for him and seems to have been the only one who ever pretended to care for him, look after him, or to check his indulgences. I do not recall that any one has asserted that her influence over him was ever exerted except for his own good.

The testimony of the subscribing witnesses to his will, has not been attempted to be impeached by the evidence of persons who are willing to swear that they believed them to be unworthy of credit under oath. It is sought to discredit them by inducing the belief that the facts testified to by them could not be true.

The defence here is a double one. Some of the defendants claim under a previous will dated January 26, 1884, and a codicil of March 24, 1884. They, of course, contend that, at the time of making that will and codicil the doctor was perfectly competent to make it, so that they fix the time of his disability subsequent to this date. The other contestants, who are not mentioned in that will, of course date his inability far enough back to invalidate that will as well as the one now in question. The claimants under that will contend that in the month of May, 1884, he was bound over by a magistrate to answer a criminal charge, and they date his general failure of mind from that time; he, it is said, having been greatly affected by it. Why a charge by a loose woman should have had such an effect upon a man of his character and habits, is a little remarkable, for the grand jury ignored the bill; so that the result of the charge was a triumph for him, as it shows that, in the opinion of the grand jury, there was not enough in the charge even to put him on trial. From that date, a large number of witnesses have been called, to show his condition from time to time, his conduct, his acts, his sayings and doings, and the opinion of the many as to his mental condition; the object of this testimony being to establish the fact that at certain times he was unable to make a will, and that this inability included the time at which the will was made. It is for you to say whether this has been successful.

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[The defendants concluded their case by the production of what is called expert testimony; that is, testimony not given in the usual manner by witnesses, who are only allowed to testify to what they know or saw, but called to give their own opinions on matters testified to by others. These gentlemen were of high character, and well known in the medical profession. The only one of them who ever saw Dr. Ruddach was Dr. S. Preston Jones. He had seen him at Kirkbride's, where he was a patient for six days, from the 27th of August to the 2d of September. The other experts had never seen him, but they are all quite positive that he had alcoholic dementia, a state of mind in which he was utterly incapable of intelligently transacting business or making a will. Dr. Jones thinks that he could not have sufficiently recovered to such an extent as would make him competent to transact business, or make a will, at any time since he last saw him, on the 2d of September, 1884, until the time of his death.]¹⁵

Among the witnesses who have testified in this case, were the well known real estate brokers, the Messrs. Sylvester. They had been for five years the men of business for Dr. Ruddach, and visited him on business, separately, ten or twelve days before his death, and two months after Dr. Jones had seen him. No one has pretended to say that they were not disinterested witnesses. That they evinced no favorable disposition to the plaintiff was quite evident.

[The court here read at length from the testimony of the witnesses referred to.]

The statements of these two witnesses are statements of actual occurrences, and not scientific opinions.

[Dr. Price, who was called after the expert testimony had been called, says: "If these gentlemen had seen Dr. Ruddach and examined him themselves, I have no doubt they would be perfectly able to give an opinion, but I do not think their opinion is worth one fig, given as it was." Whether that is a correct estimate of the value of their opinions it is for you to say under all the evidence in the case.]¹⁵

As was said, however, by Judge HOUSTON: "The facts and circumstances are the primary evidence on which the jury must rely, and not the opinion of witnesses as to the soundness of mind, or capacity to make a will. That is, it is the opinion of

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the jury founded on facts and circumstances, which they believe to be proven, and not the opinion of witnesses, which is to decide the case." In this case, as in all legal investigations, no testimony is admitted, unless the judge considers it relevant to the issues which are being tried. The testimony is, therefore, to be considered as a whole, and you are to make up your minds from that, whether the plaintiff or defendant has satisfied your minds of the justness of his contention.

That Dr. Ruddach was for years a man addicted to drink and lust is undoubted, but that fact alone would not necessarily incapacitate him from making a will. If all people who drink liquor and are fond of women, are held to be incapable of making a will, I am afraid a great many people would die intestate. The question in this case is, Did these habits so affect his mind that, at the time he made his will, he was incapable of making an intelligent disposition of his property? He was a man in possession of a large property, and this he controlled and managed until the time of his death. [We have in Pennsylvania a law, which authorizes the court to issue a commission, to determine whether a person is a lunatic or an habitual drunkard, on the application of any one related to him by blood or marriage, or of any one interested in his estate. When he has no relative, by blood or marriage, residing within this commonwealth, then any disinterested person in the county may make the application. And the word "lunatic," it is further enacted, shall be construed to mean and include every person of unsound mind, whether he may have been such from his nativity, as idiots, or should have become such from any cause whatever. On the return of this inquisition, finding that the person is a lunatic or habitual drunkard, the court can commit the custody of the person or of the estate, or both, to such person as they may deem most suitable, who shall first give security in such sum as the court shall direct, with condition for the faithful performance of said trust, and duly to account, according to law, for all property that may come into his hands. This course, no relative by blood or marriage, no one interested in his estate, no disinterested person, ever thought it necessary to adopt. One of his nearest relatives, and most frequent visitors, Mr. W. A. Ruddach, of Norristown, of course, could not do so, for he has sworn that in his opinion

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Dr. Ruddach was perfectly competent to take care of his property. The Messrs. Sylvester could not do so, for they knew he was competent, as he satisfied them by the directions he gave them in regard to the management of his estate. As to others, their anxiety about the safety of his property, and their concern as to the state of his mind, seem to have commenced after his death.] ¹⁶

His was certainly not the case of an educated gentleman, who had suddenly and unguardedly fallen into bad company and dissolute habits. Whatever the company was, he deliberately selected it. The first house he selected for his home and his drug store was at Fourth and Lombard streets. He there boarded with his present wife and her mother, and he died in Gaskill street, where he boarded with the same persons, Mrs. Dixon being a saleswoman at Heller's store, as she now is. Mr. Fortin had known him for thirty years, and continued his friendly relations until his death. Mr. Joseph Butcher, in the employ of Joel J. Baily & Co., and his wife, for seven or eight years had been on intimate terms with him, and Mr. Kessler and his family for the same length of time.

That Dr. Ruddach desired to make a will, is testified to not only by Mr. Fortin, but by both the Messrs. Sylvester, whom he had several times asked to call on him for that purpose. Whether he did make this will, clearly knowing and understanding the extent of his property, the business in which he was engaged, and without undue influence, is the question you are to decide.

The plaintiff's counsel request the court to charge [inter alia]:

4. There is no sufficient evidence in this case of a general insanity on the part of Dr. Ruddach, and, therefore, the burden of proof is on the defendants to show that at the very time he executed the will he was not of sound disposing mind, memory and understanding, or that at that very time his free agency was destroyed.

Answer: This point is affirmed; exception.³

5. Unless the jury are satisfied that the evidence shows unsoundness of mind or undue influence, at the very time of executing the will, the verdict must be for the plaintiff.

Answer: This point is affirmed; exception.⁴

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19. If on considering all the evidence in the case the jury should be in doubt, they should incline in favor of the plaintiff on both the issues.

Answer: I answer this point as follows: Testamentary capacity is the normal condition of one of full age. It is with him who undertakes to call it in question, to establish it, not in a doubtful way, but in a positive manner.¹⁸

The following points are presented on behalf of the defendants, by Mr. Beasten:

1. That it is not requisite that such derangement of intellect should be proved as would amount to insanity to set a will aside, but that imbecility of intellect, though short of insanity, is sufficient for that purpose; and, if the jury find from all the evidence in the cause, that there was such imbecility of intellect, arising from the use of alcoholic liquors or chloral, or from any other cause or causes, as, in the opinion of the jury, rendered the testator incapable of appreciating, knowing, remembering and calling to mind the value and extent of his property, at the time of making and executing said will, or that there was then such imbecility as rendered him, in the opinion of the jury, not of sound and disposing mind, memory and understanding, with reference to his said property, then their verdict must be for the defendants.

Answer: This point is refused; exception.⁵

2. That it requires less undue influence and less fraud to procure a will unlawfully from a person of weak and impaired intellect, than from a person in full mental vigor; and that, in determining the question of fraud and undue influence, the jury may take into consideration the state and condition of mind of the testator at the time of making and executing the alleged will, the condition and relative situation of the testator and plaintiff, the situations, surroundings and condition of the testator himself, the nature and extent of his property, all the circumstances under which the will was made, and the provisions of the will itself; and if, in the opinion of the jury, the alleged will was procured by fraud or undue influence, which the alleged testator, in the condition which the jury may find he was, from all the evidence, at the time of making and executing said will was too weak to resist them, their verdict must be for the defendants.

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Answer: This point is refused; exception.⁶

The following points are presented on behalf of the defendants, by Mr. Ashhurst.

1. If the jury believe that Dr. Ruddach was incompetent to make a will at any time before the alleged will was made, they should find for the defendants, unless convinced that he had recovered or acquired and retained capacity to make a will at the time he undertook to make it.

Answer: This point is refused; exception.⁷

2. When he that is at the point of death, and hardly able to speak so as he may be understood, doth not of his own accord make or declare his testament, but at the interrogation of some other answers, "Yes," or "I do so," such a testament is open to grave suspicion.

Answer: This point is refused; exception.⁸

3. A sane man may do what he likes with his own, but this liberty is not allowed to one who has given indications of mental unsoundness. In his case every provision must be strictly scrutinized, and every sign of partiality or injustice viewed with strong suspicion. That mental disorder, such as would render a testator incompetent to make a will, may arise as the sequel or accompaniment of bodily disease, and is often indicated by weakness of judgment, loss of memory, imperfect appreciation of one's relations to others, disregard of propriety, freaks, caprices, vacillation and change. And the evidence in this case for defendants in this case will, if believed, justify the jury in finding a verdict for defendants, on the ground of such mental disorder.

Answer: This point is refused; exception.⁹

4. If a man, after having attained mature life, undergoes a change of character and conduct, especially when connected with any derangement of the physical organism, it may well induce a belief that it is the result of some morbid condition of the intellectual faculties.

Answer: This point is refused; exception.¹⁰

6. That a revolution in character and conduct on the part of the decedent, whereby he adheres to what he has formerly shrunk from and rejects what he has formerly loved, is an indication of and may be ascribed to an unnatural, morbid and unsound condition of mind.

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Answer: This point is refused; exception.¹¹

7. Unsoundness of mind, evinced by a revolution in character, may co-exist with an apparent use of the faculties in many respects.

Answer: This point is refused; exception.¹²

8. That when the faculties of a man predisposed to mental disorder by inheritance, have been by long-continued indulgence in the sexual passions and protracted alcoholism, reduced to such a condition as described by the witnesses who saw Dr. Ruddach at the Pennsylvania Hospital, it should require very strong and satisfactory evidence to convince a jury that he could recover his senses sufficiently to make a will within a period of less than eighty days.

Answer: This point is refused, except as answered in the general charge.¹³

The jury returned a verdict in favor of the plaintiff, on both issues. A rule for a new trial having been discharged, judgment was entered, when the defendants took this writ,* specifying that the court erred:

1, 2. In the refusal of defendants' offers.^{1 2}

3, 4. In the answers to plaintiff's points.^{3 4}

5-13. In the answers to defendants' points.^{5 to 13}

14. In the predominance given to the plaintiff's testimony, and in virtually ignoring and passing by the defendants' evidence, and particularly in reading Messrs. Sylvester's testimony to the jury, and the stress laid upon it.

15-17. In the portions of the charge embraced in []^{15 to 17}

18. In the answer to plaintiff's point.¹⁸

19. In the portion of the charge embraced in []¹⁹

Mr. Richard L. Ashhurst and Mr. F. Carroll Brewster (with them Mr. Bradbury Bedell, Mr. Henry F. Hepburn and Mr. Charles Beasten), for the plaintiffs in error:

(1.) Upon the questions raised by the first and second assignments, counsel cited: 1 Wharton on Ev., §§ 196, 197; 2 Wharton on Ev., §§ 647, 702, 703; *Waln v. Philadelphia*, 99 Pa. 330; *Williams on Executors*, 24; *Tyrrell v. Jenner*, 2

*See *Reichenbach v. Ruddach*, 121 Pa. 18.

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Hag. 84; *Baxter v. Abbott*, 7 Gray 71. (2.) Upon the questions raised by the third, fourth, seventh, thirteenth, seventeenth and eighteenth assignments, counsel cited: *Collinson on Lunacy*, 55; *Shelford on Lunacy*, 275; *Swinburne on Wills*, §§ 3, 6, 7; *Williams on Executors*, 17-30; *Ray's Med. J.*, c. 14, §§ 230, 246; *Jarman on Wills*, c. 3; *Harden v. Hays*, 9 Pa. 151; *Leech v. Leech*, 21 Pa. 69; *Boyd v. Boyd*, 66 Pa. 292; *Landis v. Landis*, 1 Gr. 248; *Daniel v. Daniel*, 39 Pa. 193; *Hix v. Whittemore*, 4 Met. 546; *Gardner v. Gardner*, 22 Wend. 526 (34 Am. Dec. 340); (3.) Upon the questions raised by the fifth, sixth, eighth, ninth, tenth, eleventh and twelfth specifications, counsel cited: *Parrish v. Parrish*, 41 Barb. 274; *Wharton & Stille's Med. J.*, § 28, n. W; *Tawney v. Long*, 76 Pa. 110; *Wilson v. Mitchell*, 101 Pa. 495; *Leech v. Leech*, 21 Pa. 67; *Daniel v. Daniel*, 39 Pa. 209; *Dr. Ray's Report* in note to *Pidcock v. Potter*, 68 Pa. 353. (4.) Upon the questions raised by the fourteenth, fifteenth, sixteenth and nineteenth specifications, counsel cited: *McTaggart v. Thompson*, 14 Pa. 155; *Burke v. Maxwell*, 81 Pa. 139; *Washington Mut. Fire Insurance Co. v. Rosenberger*, 3 W. N. 16; *Penna. Canal Co. v. Harris*, 101 Pa. 80; *Reber v. Herring*, 115 Pa. 599.

Mr. Alex. Simpson, Jr., for the defendant in error:

(1.) Upon the questions raised by the first and second assignments, counsel cited: *Clark v. Trinity Church*, 5 W. & S. 266; *Sitler v. Gehr*, 105 Pa. 577; *Smith v. Arsenal Bank*, 104 Pa. 518. (2.) In considering the third assignment, counsel cited: *First N. Bank v. Wirebach*, 106 Pa. 37; *Aurentz v. Anderson*, 3 Pittsb. 310; *Wharton & Stille's Med. J.*, § 61; *McMasters v. Blair*, 29 Pa. 298; *Carpenter v. Carpenter*, 8 Bush (Ky.) 283; *Achey v. Stephens*, 8 Ind. 411; *Turner v. Rusk*, 53 Md. 65; *Redfield on Wills*, 92-3; *Gardner v. Gardner*, 22 Wend. 526 (34 Am. Dec. 340); 1 *Jarman on Wills*, 5th Amer. ed. 97, note c.; *Townshend v. Townshend*, 7 Gill 10; *Williams on Executors*, 6th Amer. ed., 34; *Hix v. Whittemore*, 4 Met. 545. (3.) Upon the fourth specification, counsel cited: *McMahon v. Ryan*, 20 Pa. 329; *Eckert v. Flowry*, 43 Pa. 46; *Thompson v. Kyner*, 65 Pa. 368; *Tawney v. Long*, 76 Pa. 106; *Wainwright's App.*, 89 Pa. 220; *Wilson v. Mitchell*, 101 Pa. 495. (4.) Upon the fifth and sixth assignments, counsel cited:

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McMasters v. Blair, 29 Pa. 298; Stevenson v. Stevenson, 33 Pa. 469. Upon the fourteenth assignment, counsel cited: Johnston v. Commonwealth, 85 Pa. 54; Thompson v. Kyner, 65 Pa. 374; Pennypacker v. Pennypacker, 7 Cent. R. 532.

OPINION, MR. JUSTICE GREEN:

The record of the hospital for the insane contained an entry which indicated that the testator's father was admitted in 1849 to the hospital, because of intemperance continued for six months, and that he was affected with melancholia resulting from intemperance. As there was no proof, and no offer of proof, that this species of melancholia is hereditary, we cannot see the relevancy of the record entry. It may be, or it may not be, that this form of mental affection is transmissible by inheritance, but we cannot assume that it is, in the absence of proof, and therefore the jury would not have been justified in inferring it had the entry been admitted. The first and second assignments of error are not sustained.

The plaintiff's fourth point was affirmed without qualification. The first clause of the point declared that there was no sufficient evidence of general insanity of the decedent, and the conclusion expressed in the second and last clause, was, that therefore the burden of proof was on the defendants to show mental unsoundness at the very moment of execution. An unqualified affirmance of the whole point was a positive direction to the jury that the evidence was insufficient to show general insanity. In view of the large amount and serious character of the testimony given by the defendants, as to the testator's mental condition shortly anterior to the making of the will, particularly during the summer of 1884, when he became an inmate of the insane asylum, we think it was going too far to say there was absolutely no evidence of a general insanity sufficient for the consideration of the jury. The answer should have been qualified so as to subject the testimony to the action of the jury, and that if it failed to satisfy them that there was a condition of general insanity at any time before the will was made, then the burden of proof as to the testator's condition at the time of execution was on the defendants. We feel obliged to sustain the third assignment of error.

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The fourth assignment is not sustained, as it is certainly true that the unsoundness of mind or undue influence which will defeat a will, must have been operative at the time the will was executed.

We do not sustain the fifth assignment because we think the defendants' first point is an overstatement of the essentials of testamentary capacity. It is certainly not the law that the testator must be capable of appreciating, and knowing, and remembering, and calling to mind the value and extent of his property at the time of executing his will. The language of the point is exceedingly broad. Literally it means that there must be an ability to remember and call to mind all the items of his property, and also to know and appreciate, as well as to remember, the value of each item or at least each subject of ownership, in order that the testator may reach the standard of the point. Persons having a large and diversified estate would be practically incapacitated from testacy, if so severe and exacting a standard as this were established. We question whether there is any improvement in the definition of testamentary capacity upon that given by Judge KING in 1858 in the case of *Leech v. Leech*, 21 Pa. 69, to wit: "A disposing mind and memory, in the view of the law, is one in which the testator is shown to have had, at the making and execution of a last will, a full and intelligent consciousness of the nature and effect of the act he was engaged in; a full knowledge of the property he possessed; an understanding of the disposition he wished to make of it by the will, and of the persons and objects he desired to participate in his bounty." This description of testamentary capacity has been many times approved and never questioned. While modifications of it may be needed in particular cases to meet particular facts developed, it contains all the substance of a correct general definition, and may at all times be expounded to juries as a guide to them in their deliberations with entire safety.

The second point of the defendants should, we think, have been affirmed. We see no objection to its postulates just as they are stated. Nor is the point in any degree involved or obscure. It is drawn with much care, with clearness of expression, and with entire accuracy as to its legal truth. Thus, considering it in detail, it is certainly true that it requires less

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undue influence and less fraud to procure a will unlawfully from a person of weak and impaired intellect, than from a person in full mental vigor. It is equally true that the jury, in determining the question of fraud and undue influence, may take into consideration the state and condition of mind of the testator at the time of executing his will, the condition and relative situation of the testator and the plaintiff, the situations, surroundings, and condition of the testator himself, the nature and extent of his property, and all the circumstances under which the will was made, and the provisions of the will itself.

In illustration of the propriety of this point it cannot be overlooked that, while the plaintiff was in fact the testator's wife when the will was made, she was in all probability his mistress up to that time and for several years before. He so declared her to be in her presence and without contradiction from her, to the witness, James T. Thompson, and to the witness Broughton, he said she had been his mistress for thirteen years. In addition to this, the entirely uncontradicted evidence as to the manner in which they lived together, was highly persuasive, indeed quite convincing, that this was their true relation. The circumstances, both of the marriage and the will, were also of a very unusual and gravely important character as affecting the very question of undue influence. The marriage took place on November 13, 1884, the will giving all the property of the testator to the plaintiff was executed on November 15th, and on the 16th he died. At the time of the marriage he was confined to his bed, as he was also when the will was made, with the last and fatal sickness of which he died the next day. It was literally a death-bed marriage, and a death-bed will. That he was in an extremely enfeebled condition of body was the undisputed testimony of all.

That he was also extremely enfeebled in mind was alleged by the defendants, and that allegation was supported by a great mass of entirely disinterested, and, much of it, highly intelligent, and some of it highly skilled testimony. A very great number of distinct acts, transactions, facts, declarations, and conversations done and uttered by the deceased, which were quite inconsistent with his mental soundness, were given in evidence, and might have been received and acted upon un-

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favorably to the will by any jury engaged in the trial of that question. The testator had made a will only a few months before, when he was certainly in a better condition both of mind and body, in which not a dollar of his estate was given to the plaintiff, a large part was given to a charity, and the remainder to relatives and friends. That will was the result of his personal dictation, and without doubt embodied his wishes with certainty. It is also a fact of importance that his estate was quite large, probably more than \$100,000 in value. It was a fact entirely undisputed that the testator had for many years indulged in the excessive use of alcoholic stimulants and in excessive venery. The plaintiff's principal medical witness, Dr. Price, who attended him during his last illness and for some months before, was asked: "Q. What induced you to think, the first you saw of him, that his disease was incurable? A. Simply from his history, a long life of drinking and debauchery."

It is not necessary to review the testimony on this subject. It abounds with the usual disgusting details of a life of gross intemperance, profligacy, and sensuality. The results arrived in due time. In the summer of 1884 he was taken to St. Joseph's Hospital for a time, and after that to Kirkbride's Insane Asylum where he remained for several days. Dr. Jones, who was for many years in charge of the male department of that institution and saw him and treated him while there, testified, that he was in a state of dementia with delusions. When asked to explain what he meant by this he said: "It is a state of great weakness of mind. It is the condition into which most insane patients ultimately sink, in which there is a loss of reason, intelligence, and a weakening in short of all the mental faculties." This was from August 27th to September 2, 1884, less than three months before his death."

The foregoing being a very brief mention of a part of the facts, either undisputed or very well supported by affirmative testimony, the matters of which the defendants' second point was predicated brought them conspicuously and compactly together, and required their submission for the consideration of the jury. Thus, the point asked an instruction that the jury might take into consideration "the state and condition of mind of the testator" at the time of making the will, "the

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condition and relative situation of the testator and the plaintiff, the situations, surroundings, and conditions of the testator himself, the nature and extent of his property, all the circumstances under which the will was made and the provisions of the will itself." Most certainly all of these matters were entirely, indeed, eminently, proper to be considered by the jury, in determining the question of undue influence.

The marriage was suggested by another and not by the testator; it was contracted, and the will was made in the house of the sole beneficiary, as to whom the defendants had a perfect right to argue, and ask for a finding, that she was the testator's mistress up to the moment she became his wife. In the case of *Dean v. Negley*, 41 Pa. 312, we held that the mere fact of the unlawful relation of mistress to a testator was enough to justify an inference of undue influence, and that fact, together with the fact of the devise to her children, would be enough to justify a verdict against the validity of the will. During the largest part, nearly all, of the period of the intimacy between the testator and the plaintiff, she was the wife of another man from whom she was separated, but not divorced. If there was unlawful intercourse between them it was adulterous, and comes directly within the terms of the decision in *Dean v. Negley*. Added to that was the fact, that by the terms of the will, made almost in the article of death, in her house, within her custody, and substantially in her presence, drawn by a person who was at least a stranger to the testator, the whole estate of the testator was given to the plaintiff to the exclusion of all his relatives and of the deserving charity, who had been the sole objects of his bounty in his former will. This circumstance was considered of importance in the case of *Rudy v. Ulrich*, 69 Pa. 177, commenting upon *Dean v. Negley*. While in the present case the fact that a marriage had taken place prior to the will relieves the plaintiff from the most serious risks which she would have encountered under *Dean v. Negley*, it does not relieve the testamentary act from the imputation of a continuance and a present exertion of an undue influence, if the jury in view of all the facts of the case inclined to such a belief. But from this opportunity they were practically excluded by the refusal of the court to affirm the second point of the defendants. We think the point should

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have been affirmed just as it stood, and therefore sustain the sixth assignment of error.

In one sense the first of Mr. Ashhurst's points is true, because it includes the idea that the testator, although previously incompetent, had become, and was, mentally capable at the time of executing the will, and regarded in that manner the point is certainly correct. Yet the point is so drawn that it might well mislead a judge into the supposition that its real meaning was, that if at any one time in the testator's previous life he had become temporarily incompetent, no matter how briefly, the whole burden of proving a subsequent recovery and a capacity at the time of execution rested upon the proponent. This is certainly not the law; and, because we would not reverse on the ground alone of this one refusal, we will not say there was error in refusing the point in the language in which it was framed. The seventh assignment is not sustained.

The eighth assignment is not sustained because while the point was abstractly true there are no facts in the case which make it applicable.

We cannot sustain the ninth assignment because the first two clauses of the point which it covers are too strongly stated, and the point was simply refused as an entirety. It is not legally true that one who has merely "given indications of mental unsoundness" is not at liberty to do what he likes with his own, or that in such case every sign of partiality or injustice must be viewed with strong suspicion. Persons may easily give "indications" of insanity without in reality being insane, and they cannot be charged with testamentary incapacity for so unsubstantial a reason as that. Dr. Ray's report in *Pidcock v. Potter*, 68 Pa. 353, is not the opinion of the court.

We cannot sustain the tenth and eleventh assignments because the points which they cover are not sufficiently certain or specific to justify the affirmance of either. The change of character spoken of may be from bad to good, and certainly such a change cannot be regarded as indicating mental aberration of any kind.

The twelfth assignment is sustained because the point to which it refers is entirely correct and should have been affirmed just as it stood.

The point covered by the thirteenth assignment is not a legal

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proposition, nor is its deduction an inference of law from the facts of which it is predicated. The law cannot know whether it would require very strong and satisfactory evidence to convince a jury that a man, conditioned as the testator was described by witnesses to be at the Pennsylvania Hospital, "could recover his senses sufficiently to make a will within a period of less than eighty days." The jury alone could know what their conception was as to Dr. Ruddach's mental condition when at the hospital, and they only could know how much and what kind of testimony could remove their impressions upon that subject at any particular time. We do not see what relevancy or legal propriety there is in suggesting a period of eighty days as a possible limit within which a radical change of mental condition could not take place, when there was abundance of testimony as to what his actual condition was at the end of that period, and ample opportunity to deliver direct testimony on that subject. The idea of the point seems to be to substitute a theoretical inference as to what the testator's condition ought to be, or might be expected to be, at a given time, for specific evidence as to what it actually was. Courts have nothing to do with declaring propositions such as this, and the point was properly refused.

The fourteenth assignment is of much more importance and we think it is sustained. Of course when the learned court below selected the testimony of two witnesses on one side upon one subject, and read it at much length to the jury, it would naturally be inferred by the jury, that in the opinion of the court that testimony was of controlling importance; and when there was an entire omission to read any of the evidence on the other side having a contrary tendency, they would naturally consider that in the opinion of the court such opposing testimony was of no efficacy and was not entitled to any consideration from them. If the testimony upon one side of a controverted question of fact is made prominent and conspicuous in the charge, common fairness requires that equal prominence should be given to opposing testimony having a contrary tendency. A careful reading of the charge impels us to say that we think it amenable to the criticism of this assignment. Though there was much statement and considerable argument, in the charge, of the testimony favorable to the plaintiff, and

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of the theories upon which her side of the case was submitted, we do not discover the least allusion to the great bulk of the defendants' testimony, and only an allusion to the testimony of Dr. S. Preston Jones, who testified in the most emphatic manner, giving reasons which seem to be of grave importance and founded upon ample observations, for the conclusions which he reached and announced. But there was beside all this a great amount of testimony to specific acts, conversations, and declarations of the testator, indicating not merely a weak but a disordered mind, established by what seems to be entirely credible testimony, and to all or any of this there is not the slightest allusion in any part of the charge. There was considerable testimony that the testator was subject to delusions of an extraordinary and absurd character, but no reference to any of it was made in the charge. There was much testimony as to his excessive use and abuse of intoxicating liquors, and the effect thus produced both upon his mind and body. The only reference in the charge to this branch of the defendants' testimony is the following: "That Dr. Ruddach was for years a man addicted to drink and lust is undoubted; but that fact alone would not necessarily incapacitate him from making a will. If all the people who drink liquor and are fond of women, are held to be incapable of making a will, I am afraid a great many people would die intestate." That such a remark as this might be made with propriety in a case where the testimony showed nothing but an occasional indulgence in liquor or sexual intercourse, may not be questioned, but to dispose in this way of the entire mass of the testimony in this case, on these subjects, showing such a complete breaking down of the testator's physical powers and a very serious impairment of the powers of his mind, was not in our opinion an adequate or a correct treatment of the testimony.

Edward Lynch, an attendant at Kirkbride's, described his condition thus: "He was very peculiar; more so than any patient I had seen there. His mind was entirely gone; one time he admitted to me he had been a doctor, and that is the only thing I could get from him. He was incoherent, and he was full of delusion. I heard him say once that there had been men all around him going to shoot him—men all around his room—and he used to get very noisy in his talk. He ap-

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peared to have imaginary objects before him all the time." Strawbridge, a watchman at the same place, said: "His talk was at times loud and incoherent; at times he acted more like a man frightened and in fear of something, seeming to shrink from some possible enemy, deprecating or apprehending some injury, and he would make such noises or exclamations as would indicate fear or dread." After he left Kirkbride's in the latter part of September, 1884, he was staying at the Delaware Hotel. Hugh Jones, the proprietor, after describing some of his peculiarities, said: "He required exercise, and he would sit there from morning to night in a chair taking no exercise, and I would say to him, 'Doctor, why don't you go out and take exercise?' He said, 'I am afraid; don't you see those fellows watching me. The moment I go out they will arrest me.' I tried to convince him there was no person there to disturb him, but I could not." The same witness further testified: "I recollect one day, he put his hand in his pantaloons pocket and pulled out I should judge from two dollars to four dollars in silver, but I do not know exactly the amount, and he said to me, 'Mr. Jones, this is all the money I have in the world. I must get something to do or I will starve.' He was very much distressed. I tried to convince him it was a fallacy but I did not succeed." Dr. S. Preston Jones, the physician in charge at Kirkbride's, said: "He was stupid and dull. I could get no responsive replies from him to my questions. He could not give me any account of his feelings, or tell me anything about himself, who he was, where he was and so on. . . . I then observed him for the next two or three days more closely or quite closely, and became satisfied he was of unsound mind." Plumley, another witness, testified after giving many other facts and particulars, as follows: "Q. Toward the last, when he became weaker, was he harder to manage by Mrs. Dixon, or was he more easily managed by her? A. He was easier managed. Q. Explain how that was. A. All she would have to do would be to say to him when he wanted to do anything, 'Will, you must not do that,' and he would drop like a child. It made no difference what it was." "Q. What did he say about wanting you to bury him, how would he express himself about it? A. He said that he was poor—that he had nothing, that they had got every cent

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of his money, that they had got all he had and he wanted me to bury him." This was when he was fast in bed shortly before his death.

These are a very few of the matters in evidence as to his mental and physical condition. Other delusions and other facts were shown tending to establish the effect of his habits of dissipation and debauchery upon his mind and body, and they were far too numerous in the aggregate, and of too serious a character, to be passed over with so slight a reference in the charge as heretofore stated. A large amount of expert testimony was given by physicians of experience, character, and ability, on behalf of the defendants. It was all disposed of in the charge by repeating a remark of Dr. Price, the plaintiff's medical witness, that he had no doubt the defendants' medical witnesses were competent to give an opinion if they had seen Dr. Ruddach, but given as it was, he did not think it worth a fig. Such a treatment of that testimony by the court in charging the jury would naturally lead the jury to treat it in the same way. The writer has read that testimony and feels obliged to say that it was entitled to a far more serious consideration. A long hypothetical question, embodying the facts in evidence, was propounded to the medical witnesses. All of them expressed the opinion that, upon the facts stated in the question, Dr. Ruddach was of unsound mind with scarce a possibility of recovery at the time the will was made. Dr. Wood, one of these witnesses, being asked to state his reasons for his opinion said: "In the first place the history is plain of a long continued and excessive abuse of alcohol and of venery—causes which lead to mental deterioration and may lead to absolute dementia, or loss of mental power. . . . The symptoms were in a word those of chronic alcoholic dementia at that time, and were clearly not those of acute alcoholic poisoning, or of delirium tremens. The history of the case during the man's stay in the Pennsylvania Hospital is clearly that of chronic alcoholic insanity with dementia. The history of the case so far as it is afforded after that time is, that during his stay in the hotel the characteristic symptoms of alcoholic dementia were present and those of delirium tremens certainly not at all. Such a state I believe could scarcely be recovered from, even if it had lasted but for a few days. Having, how-

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ever, lasted for a succession of weeks and the man dying a few months afterwards, or a short time afterwards, it is almost impossible there should be a recovery with mental capacity."

Some idea of the extent of the testator's habit of drinking is conveyed by the testimony of one of the saloon keepers. He was asked: "Q. During the last year of his life how frequently do you suppose he would take drinks at your place a day? A. I could safely say twenty. Q. Do you mean to say that he would average twenty a day? A. Yes, and I guess a great many more than that. I am positive of twenty. Q. What kind of liquors did he drink? A. Whiskey and champagne. Q. Was he in the habit towards the latter part of the time of getting whiskey at your place for nights? A. Yes, sir; he always used to take a small flask home with him on a night, saying that he couldn't sleep without it. Q. What would he put in it? A. Whiskey." When it is considered that this was only one of the places he visited, it is not difficult to understand the effects which resulted upon the testator's mental and physical condition.

We have made these few references to the testimony simply to illustrate what seems to us the incomplete character of the charge of the court in dealing with the case. In *Burke v. Maxwell*, 81 Pa. 139, the present Chief Justice in delivering the opinion said: "When there is sufficient evidence upon a given point to go to the jury, it is the duty of the judge to submit it calmly and impartially. And if the expression of an opinion upon such evidence becomes a matter of duty, under the circumstances of the particular case, great care should be exercised that such expression should be so given as not to mislead, and especially, that it should not be one sided. The evidence, if stated at all, should be stated accurately, as well that which makes in favor of a party as that which makes against him." In the case of *McTaggart v. Thompson*, 14 Pa. 149, we said: "In addition, the defendants have just reason to complain of the one-sided character of the charge. It is objectionable because it resembles the argument of the advocate, rather than the impartial survey of the judge." In *Penna. Canal Co. v. Harris*, 101 Pa. 80, we said: "The main complaint is that the case was not justly and fairly submitted to the jury; that the evidence and theory of the defendant were

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fully and prominently presented, and the strength of the plaintiff's case was so presented as not to call their attention to the main points in the plaintiff's case. . . . It is error to confine the attention of the jury to one view of the case, where there is more than one which they should consider." After referring to some of the testimony given by the plaintiff the opinion proceeds: "If this evidence be correct it should be submitted to the jury as having great force, yet the evidence was incidentally referred to by the judge, and in a manner not calculated to induce them to give it a proper consideration." We have so frequently held that giving undue prominence to the testimony on one side of a case is error, that a reference to the cases is unnecessary. The fourteenth and fifteenth assignments are sustained.

We are not referred to any testimony proving that no proceedings in lunacy were commenced against the testator in his lifetime, and we do not know whether such was the fact or not. This being the case, we think there was no propriety in the remarks of the learned court upon that subject, winding up with this statement in regard to the contestants: "Their anxiety about the safety of his (testator's) property and their concern as to the state of his mind seem to have commenced after his death." Such a remark would naturally tend to create a prejudice in the minds of the jury against the defendants, and for that reason it is out of place in a charge. Even if there had been proof that no proceedings in lunacy were commenced against the testator in his lifetime, we do not think that circumstance would be of any weight in view of the facts of this case. It is true that in *Irwin v. West*, 81* Pa. 157, it was held that the omission to commence such proceedings might have some weight to be considered by the jury, but that was said with reference to the facts of that case. In the present case the testator had no near relatives—no parents, no children, or lineal descendants—and nearly all of such relatives as he had lived out of the state. His nearest relative in Pennsylvania, W. A. Ruddach, a cousin living at Norristown, said he did not have knowledge of a proceeding in lunacy, but that he thought there was such a commission; he had heard so but could not tell when. As the testator was neither an idiot nor a lunatic, and the worst effects of his mode of life did not be-

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come so very serious until shortly before his death, we do not see that the omission to commence proceedings was of any weight whatever as against the good faith of the present contest over his will, and in any other point of view such omission was not a proper subject of remark. We, therefore, sustain the sixteenth assignment of error.

As to the seventeenth and eighteenth assignments, we think it altogether likely that the learned judge did not mean to convey the idea that proof of incompetency or undue influence must be positive as distinguished from circumstantial, in the character of the testimony offered, but nevertheless he did so charge in literal terms, and of course it was error. There is no rule of law that allegations of mental unsoundness or undue influence in feigned issues on wills must be established by positive evidence, and hence to say that it must, in a charge to a jury, tends to give the jury an erroneous idea of the quality or character of proof required. We are, therefore, obliged to sustain these assignments.

We do not think the nineteenth assignment is of any material consequence and, therefore, do not sustain it. The words, "overwhelmingly established," in the charge in relation to Mrs. Dixon's conduct towards the testator are, perhaps, too strongly stated, in view of some of the evidence, but the whole subject is one of very minor consequence, and we would not feel at liberty to reverse on that ground.

Judgment reversed and a new venire awarded.

 APPEAL OF JOSIAH KISTERBOCK.

[ELBERT V. KISTERBOCK ET AL.]

127	601
172	625

127	601
25 SC	'339

FROM THE DECREE OF THE COURT OF COMMON PLEAS NO. 3
OF PHILADELPHIA COUNTY, IN EQUITY.

Argued January 11, 1889—Decided October 7, 1889.

[To be reported.]

1. A certificate of stock, issued by a corporation having legal power to issue such certificates, is a continuing affirmation that the holder therein named is the owner of the amount of stock specified, upon which a

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- purchaser or pledgee, dealing with the person named in the certificate or his assignee, has a right to rely as against the corporation.
2. If upon the faith of a regularly issued stock certificate, a purchaser or pledgee of stock, which in fact has been fraudulently and collusively issued by officers of the corporation, advances money or parts with anything of value, the corporation is bound by way of estoppel, to indemnify him to the extent of his expenditure, against loss in consequence of the falsity of the certificate.
 3. A holder of such a certificate, who has received it as collateral security for a pre-existing debt from the person in whose name it was fraudulently issued, being uninjured by the falsity of the statements which it contains, has no claim upon it which he can enforce against the corporation.
 4. Such a certificate is worthless, as a certificate, and gives no rights of its own force. A transfer thereof passes to the transferee no right or claim to shares of stock. The only right which can exist upon it, as against the corporation, is created by the act of parting with a valuable consideration in reliance upon its statements.
 5. When such a certificate is given in pledge, the thing pledged is not shares of stock, but merely a right to call upon the corporation for indemnity against any loss suffered in consequence of reliance upon its representation that the person therein named is the owner of the shares therein mentioned.
 6. If a fraudulent certificate is pledged by one who has no claim to indemnity thereon, and the pledgee receives, in settlement of his claim to be indemnified for his advances made on the pledge, genuine shares of stock, surrendering the spurious shares so pledged, such genuine shares do not become a substituted pledge in his hands, but are his absolutely.
 7. Wherefore, a pledgor of such certificate, who has himself no claim to be indemnified thereon, is not entitled to recover from his pledgee who advanced money to him on the faith of it, any part of what the latter may have received from the corporation upon his claim for indemnity, although such claim may have been paid in genuine shares which afterwards increased in value to an amount exceeding the debt of the pledgor to the pledgee.

Before PAXSON, C. J., STERRETT, GREEN, CLARK, WILLIAMS, MCCOLLUM and MITCHELL, JJ.

No. 344 January Term 1888, Sup. Ct.; court below, No. 259 September Term 1883, C. P. No. 3 in Equity.

On September 17, 1883, William T. Elbert filed a bill in equity against Josiah Kisterbock and the West Philadelphia Passenger Railway Company, which as subsequently amended averred:

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That on March 18, 1876, the plaintiff gave to defendant Kisterbock three notes for \$11,000 each, and, as collateral security for said notes, certificates for 300 shares of the capital stock of the said railway company belonging to the plaintiff; that said notes were renewed on August 9, 1877, and were then increased to \$11,500 each; that the pledged certificates of stock had been surrendered to the railway company by Kisterbock, who received in lieu thereof certificates for a like number of shares issued in his name; that the plaintiff, by reason of financial straits, had been unable after the maturity of said notes to pay them or redeem said collateral; that defendant Kisterbock sometimes pretended that about the year 1880, though without notice to or the consent of plaintiff, he had exchanged said stock for other stock of the same company, representing a smaller portion of interest in the company than the stock originally pledged to him, and held said substituted shares as his own, without liability to account therefor; whereas, if such exchange were made, plaintiff was entitled, on the coming in of the evidence in this cause, to elect either to treat it as a wrongful conversion of the original pledge, or to treat the new stock as a substituted pledge; that Kisterbock still held said renewal notes, and plaintiff needed discovery of their form and contents; that since the maturity of said renewal notes there had been sales of shares in the stock of said company made at \$160 per share, and the present market value of the stock pledged to Kisterbock was greatly in excess of the principal and interest of said notes; that said Kisterbock received from the railway company dividends on said pledged stock amounting to \$19 per share, and additional dividends since the filing of the original bill, and that other dividends might be declared before final hearing; praying for an accounting between the complainant and Kisterbock, and for general relief.

To this bill, as amended, the defendant Kisterbock filed an answer in which he admitted the pledging of the 300 shares as collateral for three notes of \$11,500 each, and that he still had the notes in his possession; also, that the present value of the stock exceeded the principal and interest of the notes, and that dividends had been declared thereon; but he averred that the shares of stock transferred to him by the plaintiff were not genuine shares, but were part of a fraudulent over-issue made

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by John S. Morton, the president of the company, without authority; that this over-issue had been made the subject of a bill in equity filed in the Court of Common Pleas No. 2 of Philadelphia, by Sarah Swain et al. against the railway company and its officers and directors, praying for an injunction restraining the company from making transfers or paying dividends upon said stock, and a decree for their cancellation; that the railway company filed in said cause a cross-bill against said Kisterbock and other persons who were holders of similar fraudulent shares, praying for a decree directing an inquiry as to who were claimants of the shares of the stock of said company, and that such claimants be required to establish their rights against the company; that in said proceeding it was decided that the holders of this stock were creditors of the corporation for as much money as they had actually paid for or on account of the shares held by them respectively, and the suit resulted in a decree in Kisterbock's favor, that he was entitled to be paid all the money he had advanced upon the pledge of the stock held by him, and which he had lost by reason of its fraudulent character; that at the time of this decree the debt for which he held said stock as security amounted, with interest, to over \$40,000; that the market value of 300 genuine shares of stock at that time did not exceed \$24,000; that in settlement with the company he received and accepted 300 genuine shares of stock, surrendering the fraudulent shares which had been pledged to him. The answer further averred that the complainant never advanced any money to John S. Morton upon the faith of said shares, and that he had no personal interest in the transaction set out in the bill, but had acted therein as the broker of John S. Morton, and had no right to any value said shares might have over and above the amount of said notes.

As a further defence, defendant Kisterbock set up *inter alia*, as cause of demurrer, that the complainant had an adequate remedy at law.*

Issue having been joined, the cause was referred to *Mr.*

* The answer of the other defendant, the railway company, and also a cross-bill filed by it against Elbert and Kisterbock, which was dismissed by the court below, are omitted from the report, because they are not necessary to an understanding of this appeal, and the issues raised by them as to the rights of the railway company are not involved therein.

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Abraham M. Beitler, as examiner and master, by whom the following facts were found, as shown by his report filed September 27, 1886:

Some time in or prior to 1876, John S. Morton, the president of the West Philadelphia Passenger Railway Company, by collusion with certain other officers of the company, caused to be issued a large number of fraudulent certificates of stock in said corporation. Included in this fraudulent over-issue were 300 shares, of which Morton subsequently transferred 200 to John W. Patten & Son, and the remaining 100 to Charles Lennig. In 1876, Morton delivered to William T. Elbert the certificates of those shares standing in the names of Patten & Son and Lennig respectively, accompanied by blank powers of attorney to transfer. Elbert executed three notes, to his own order, dated March 18, 1876, for \$11,000 each, which he placed in the hands of W. M. Capp, a broker, together with the certificates for said 300 shares of stock, and the powers to transfer the same. Upon these notes Capp procured loans from Josiah Kisterbock, and as security therefor, delivered to him said stock certificates and powers to transfer. Thereupon Kisterbock had these shares transferred to his name upon the company's books. These notes were renewed from time to time, the last renewal being on August 9, 1877, when the amount of each was increased to \$11,500. Prior to this renewal the fraudulent character of these shares had been discovered, and the suit in equity, mentioned in Kisterbock's answer to the plaintiff's bill, was instituted, to determine the status of the over-issued stock. There were then 3,437 shares of the capital stock, including 2,276 fraudulent shares in the hands of pledgees, who had received them mediately or immediately from Elbert. The railway company filed a bill in said suit against all the pledgees of fraudulent stock, as stated in the answer, without making Elbert a party thereto. Elbert's first knowledge of the proceeding, so far as appeared, was about the time the master's report in that proceeding was filed. The master therein reported that Morton was indebted to the railway company in several hundred thousand dollars; that there were outstanding 8,000 genuine shares and 9,207 fraudulent shares of its stock, and that the pledgees of the fraudulent shares, by reason of the operation of the certificates as an estoppel against the company, were entitled

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to a decree against it for the inherent value of each share as the same was affected by the total issue, valid and invalid, which represented a claim against the corporation, and fixed this value at \$75 per share. Arrangements having been made by the company for increasing its capital stock to 15,000 shares, without any increase in corporate assets, the master recommended a decree empowering the company, in lieu of the payment to the pledgees of \$75 per share, to issue to such of them as were willing to accept, new certificates of stock in exchange for the fraudulent certificates held by them, provided that not more than 7,000 such new certificates be issued. Such a decree was made, and Kisterbock elected to take and did take 300 new shares in exchange for those that had been pledged to him, which he surrendered.*

Upon the issue raised in the present proceeding, as to Elbert's ownership of the stock pledged to Kisterbock, Elbert testified that in 1870, John S. Morton was indebted to him in a large sum; that shares of stock were given to him by Morton as collateral for this indebtedness; that Morton gave him other shares on which to raise money for him, Morton, and that he held all the stock given him, as collateral for the indebtedness owing from Morton, but had no written pledge thereof. The master's report contained no finding that Elbert was the owner of the shares pledged to Kisterbock, or had advanced any money therefor, nor any finding as to the existence of the indebtedness which the plaintiff testified was owing to him from Morton.

Upon the foregoing findings of fact, the master, following the ruling of the court below in *Elbert v. Jeanes*, 260 September Term 1888, in Equity, [see *Jeanes's App.*, 116 Pa. 573,] held that the plaintiff was entitled to an account, and was to be credited with the value of the 300 shares of stock at the highest market price attained since the pledging thereof, to wit, \$206.50 per share, with all the dividends thereon and interest, and was to be debited with the amount of the several notes with interest. He thereupon stated an account, finding that there was due to the plaintiff from Kisterbock, on August 10, 1886, a balance of \$27,572.73, and recommended a

* See *Wright's App.*, 99 Pa. 425.

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decree for the payment of this sum, and the surrender to the plaintiff of his three promissory notes for cancellation.

Exceptions to the report of the master were filed by Kisterbock, the tenth being as follows:

10. The learned master erred in deciding that the plaintiff was entitled to be credited with the value of the 300 shares of stock at the highest market price attained since the pledging thereof.

On January 26, 1888, after argument before the court in banc, the following opinion, REED, J., was filed:

The present case differs from the other suits brought by this plaintiff in the one important respect, that to enable himself to recover he has but to make out his title to the subject of the controversy, the shares, namely, of the capital stock of the West Philadelphia Passenger Railway Company. The defendant here has not sold, as did the other defendants, the shares pledged, and thereby incurred a loss of the difference between the proceeds of the sale and the amount of money lent upon the security of the stock. On the contrary, he still retains the latter, which in his hands has been and still is worth much more than the plaintiff's debt to him.

The only answer he can make to a demand for an account is to show that the plaintiff has no title to the thing pledged, or that the plaintiff should have proceeded at law, or that he should have tendered the amount of the debt, etc., before bringing suit. On the question of jurisdiction, the ruling of the Supreme Court we regard as clear; for in none of the suits in equity, which, arising from these transactions, have been taken by appeal to that tribunal, has there been an intimation of a want of jurisdiction because of the remedy at law being adequate. In respect to the plaintiff's title, inasmuch as it is settled that the stock pledged by him was his when pledged, the defendant, the pledgee, must show how and when the title to it passed out of the plaintiff and became his, the defendant's. This, in our opinion, he has entirely failed to do.

The re-distribution of the stock, when it became necessary to ascertain the rights of the holders of genuine stock of the West Philadelphia Passenger Railway Company, and those of the holders of the over-issued stock, divested no titles and

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created none, beyond the change which was involved in compelling the railway company to acknowledge as valid the fraudulent acts of certain of its officers. It is true, that the counsel for the defendant has cited the Supreme Court, in *Jeanes's Appeal*, 116 Pa. 573, as ruling that Elbert, the plaintiff, had no equity, and has made in support of his view a quotation from the opinion of the court to the effect that *Jeanes's Appeal* was based substantially upon the same facts as five appeals taken by Elbert, and argues that the feature which these cases had in common could not have been the distribution made among themselves by the members of the firm of Isaac Jeanes and Co., as in fact there was no such distribution in the other cases, and insists that a want of equity on the plaintiff's part must have been what the Supreme Court had in mind. While the distribution, instead of a sale, which took place in *Jeanes's case*, was certainly thought by this court to be a violation of the contract of pledge, and was made the ground of a ruling in that case different from those which were made in the other cases by it, and by Court of Common Pleas, No. 2, yet as no allusion was made by the Supreme Court, to any want of equity on the plaintiff's part, it is easier to suppose that the court regarded the appeals as all showing a sale by the pledgee, and the distribution made by Jeanes & Co., followed by a sale, as being also such a sale, than to put any other interpretation upon their words.

The failure of the plaintiff to make a tender was another point in which all these claims put in suit by him are identical, and is one which it cannot be supposed was disregarded in *Jeanes's Appeal* and *Elbert's Appeals*. If no tender was necessary before bringing suit, the question next arises as to what is the measure of damages.

It is well settled that where after tender made of the debt, the pledgee refuses to deliver the pledge to its owner, or where, in the absence of notice to the latter he parts with the pledge, he is bound to compensate the pledgor in damages, to be measured by the highest price at which such stock or bonds (and the rule does not extend to every species of pledge), have been sold during the time in which the pledgor was wrongfully deprived of his property. While in the present case the stock has not been parted with, yet it is difficult to say at what point of

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time any conversion has taken place, and upon a conversion is based the other rule of damages to be stated presently. A defendant asserting a lien upon a pledge, and a plaintiff claiming an account of his property, are not in the eyes of a chancellor like the parties in *detinue* or *trover*; and the principle, therefore, just suggested, namely, that the measure of damages is to be taken at the value of the pledge when it was converted to the pledgee's use, can scarcely be applied. The defendant's refusal to re-deliver the pledge without tender made him of the debt, cannot work a conversion, and clearly, for the purpose of this discussion, no such subsequent step in the pleading as the defendant's answer denying the plaintiff's title can operate to that end. There having been, then, no refusal to deliver the pledge after tender made, and no parting with it by the pledgee, the special measure of compensation first stated is not applicable, and in the absence of a conversion of the stock by the defendant, the general rule has no bearing.

If, however, we are right in our view of the case, there is another and more equitable disposition of it to be adopted, because, the parties being come into court for the settlement of an account, are neither of them strictly speaking in such default as to give rise to any judgment in the nature of a penalty. The plaintiff asks for an accounting and need, therefore, have made no tender, and the defendant, not having refused satisfaction after tender made, is to be held only to an adjustment of rights when such adjustment is ascertained by the court.

The plaintiff, then, is entitled to redeem his stock, and should he fail to do so in a time to be fixed, the same should be sold under the direction of the master, who will state an account of the proceeds and the rights arising in relation thereto. The exceptions Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12 and 13 to the master's report are dismissed. Exception 10 is sustained, and counsel will submit a decree drawn in accordance with this opinion.

A decree was thereupon signed, adjudging that the plaintiff was entitled to redeem his pledge of 300 shares of stock upon tendering to the defendant, within fifteen days from January 30, 1888, the sum of \$33,351.55, being the amount of his indebtedness to Kisterbock, as of that date, less the dividends

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which had been declared upon said stock, and interest thereon to the same date; that upon failure of the plaintiff so to redeem, said shares should be sold after thirty days' public notice, under the direction of the master, who should state an account on the basis of this decree, and adjust the rights arising in relation thereto.

Thereupon defendant Kisterbock took this appeal, specifying that the court erred:

1. In not decreeing a dismissal of the bill for want of merit.
2. In not dismissing the bill, by reason of the matter not being one cognizable in equity.
3. In decreeing payment of any sum by defendant.
4. In decreeing a sale of the shares of stock.

Mr. John G. Johnson (with him *Mr. William H. Lex*), for appellant:

1. Elbert had no right to hold the 300 shares of stock, fraudulently issued, as security for an antecedent indebtedness from Morton to himself, even if such existed, because the railway company was responsible for the fraudulent certificates only to the extent that value had been advanced on the faith of them. Beyond its liability to indemnify persons who had acted in reliance upon the representations contained in them, they were worthless. If specifically pledged to Elbert for a past due debt, he could not have maintained any claim on them against the company, because not injured by any false representations made by it or its authorized agent. The utmost extent to which the receipt by Kisterbock of other shares, in settlement of the railway company's liability to him, could damage Elbert, was the amount of the notes secured by the pledged shares. By canceling such notes he would receive all he was entitled to. Moreover, Elbert had no right to compel the company to transfer the shares to him from Morton, the owner, or Kisterbock, Morton's pledgee, so long as Morton remained indebted to it. Having failed to receive a transfer upon the books of the company, he had no right which was valuable, and could not be injured by anything done by Kisterbock. Nor had Elbert any interest in any of the pledged shares, saving to the extent to which he had paid to Morton the proceeds of the discount of his notes, the amount of which proceeds was not

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proven. No antecedent debt by Morton to Elbert was established, and there was no proof of any pledge of these shares by Morton for any such indebtedness.

2. The bill as filed disclosed no case within the jurisdiction of a court of equity. It sought to charge the pledgee of stock, still remaining in his hands, with its value, although admitting that there has never been a tender of payment of the debt. A pledgee is not bound in such circumstances to sell the stock, in order to give to the pledgor the benefit of an existing excess in the market value of the shares over the amount of the debt: *Jones on Pledges*, § 606. Nor, under the evidence, could the bill be amended so as to present a cause within the jurisdiction of equity. To entitle a pledgor to relief in equity, he must aver and prove some special ground, such as payment of the debt, or refusal to accept a tender thereof, or, that, by reason of the necessity for an account, only obtainable in a court of equity, he is unable to make a tender. The only amendment of this bill that could be made under the evidence, would leave it a bill claiming damages and nothing else. For these complainant has an adequate remedy at law: *Conyngham's App.*, 57 Pa. 479. Moreover, a chancellor ought not to decree specific performance of a contract to surrender pledged stock procurable on the market: *Foll's App.*, 91 Pa. 437. He should interfere only in two cases: where there has been a breach of trust, and where the articles pledged have a special value that cannot be replaced without great difficulty.

3. The decree of the Court of Common Pleas No. 2 judicially ascertained the value of the shares at the time of the alleged conversion by Kisterbock, and restricted Elbert to a right to have credited against his debt that value alone. As shares they were worthless, but the decree found that it was the duty of the company to make good as damages to Kisterbock their value, \$75 per share. Elbert cannot repudiate this proceeding, because such action would entitle him to nothing but the shares confessedly worthless. Kisterbock's duty to him was honestly to prosecute the claim for damages against the company. It is not pretended that this was not honestly done, nor that he did not secure the best obtainable decree. The fact that he was given the option to take his damages in cash or in stock, and chose the latter, gives Elbert no right to the

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benefit of a subsequent rise in value. And even if Elbert was entitled to object to Kisterbock's action, this right has been lost by laches, as he knew of the decree in favor of Kisterbock, and allowed years to pass without repudiating the latter's action under it: *Hayward v. Bank*, 96 U. S. 611; *Colket v. Ellis*, 10 Phila. 379; *Rennyson v. Rozell*, 106 Pa. 413; *Baker v. Drake*, 53 N. Y. 211 (13 Am. Rep. 507); *Evans's App.*, 81 Pa. 278; *Ashhurst's App.*, 60 Pa. 290; *Neely's App.*, 85 Pa. 387. In no event is Elbert entitled to a decree for a greater amount than the balance which would be due him on the basis of the value of the shares at the time when, by his bill, he acquiesced in the conversion. The bill treats them as converted in 1880. The rule of damages in this state is well settled: *Neiler v. Kelley*, 69 Pa. 403; *Work v. Bennett*, 70 Pa. 489. The rule is the same in equity as at law: *Baker v. Drake*, 53 N. Y. 211 (13 Am. Rep. 507). The tendency of the decisions is toward limiting the rule awarding high damages: *Huntington etc. R. & C. Co. v. English*, 86 Pa. 247; *North v. Phillips*, 89 Pa. 254. Although the court set aside the action of the master in awarding Elbert the highest value of the stock up to the time of the decree, it has done the same thing in effect by ordering a sale of the stock, as the market price is now higher than ever before.

Mr. F. Carroll Brewster (with him *Mr. F. H. Cheyney*), for appellee:

1. Under the equity proceedings in Common Pleas No. 2, Kisterbock, as the record conclusively shows, received the 300 new shares as a simple substitution for the old ones originally pledged, still retaining the notes which were the foundation of the pledge. The right of a pledgee is strictly confined to a sale; he cannot appropriate the pledge to himself on default of the pledgor, even under an agreement that on such default it shall become irredeemable, such agreement being void: *Story on Bailm.*, § 318; *Mackeldy on Roman Law*, p. 277; *French Civil Code*, § 2078. In this case, there having been no sale, Elbert's title to the stock, qua stock, has never been legally divested. The argument that Elbert had no right to take and hold the stock in pledge for an antecedent debt due him by John S. Morton, can have no application whatever. It is no business of the pledgee what Elbert paid for the stock pledged,

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provided he did not steal it or no one else proved a better title to it, and the only parties claiming this stock are the pledgor and pledgee. There is no proof that Elbert knew of Morton's fraud, or had any complicity therewith. He produced accounts before the master which are a part of the record, but which appellant did not print, showing vouchers for every cent of money paid by him for account of John S. Morton, covering all moneys raised by him upon the 3,437 shares of stock which he pledged to the appellant and other persons.

2. The bill in this case was for an account. The plaintiff did not know how much he ought to tender in order to redeem, and therefore no tender was possible. This fact settles the jurisdiction of equity. Tender was not a prerequisite: *Conyngham's App.*, 57 Pa. 474. It would have been a vain thing, at any time after suit brought, to have made a tender, even had plaintiff known what amount of dividends had been declared upon the pledge, for the defendant refused to account for it, denied the jurisdiction of the court to make him account, and asserted ownership of the stock in himself. As to the question of the alleged laches of Elbert in filing his bill, the cases cited by appellant have no bearing upon the present case. In *Neiler v. Kelley*, 69 Pa. 403, the opinion states that the general rule confining the damages in trover to the value of the goods at the time of conversion, may be considered as modified as to stock, railroad bonds, etc. In *Huntingdon etc. R. & C. Co. v. English*, 86 Pa. 247, and *North v. Phillips*, 89 Pa. 254, this modification was said to apply where the parties bear to each other a trust relation. There can be no higher species of a trust than a pledge, and the principles laid down in *Bank v. Reese*, 26 Pa. 143, and *Conyngham's App.*, 57 Pa. 474, under which stock pledged and converted or improperly sold by the pledgee, must be accounted for at the highest price it attained in the market at any time afterward, govern this case. Kisterbock's denial of Elbert's ownership amounted to such a conversion as to render him liable to account at this rate.

OPINION, MR. JUSTICE GREEN:

Undoubtedly, the overshadowing, controlling question in this case is, the character of the plaintiff's title.

Certainly the relation of pledgor and pledgee was intended

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to be created by the original transaction between the parties. We should have no difficulty in enforcing the pledge in this proceeding and in accordance with the decree of the court below, if the proper conditions existed with relation to the substance of the pledge. The case is quite peculiar, not to say without parallel, in its facts.

The plaintiff had possession of two papers which purported to be certificates of stock of the West Philadelphia Passenger Railway Company, one for two hundred and the other for one hundred shares. The former was issued in the name of John W. Patten & Son, and the latter in the name of Charles Lennig. These certificates the plaintiff pledged to the defendant as collateral security for the payment of three notes, made by himself, payable to his own order, each for the sum of \$11,500. The actual transaction was made by one Capp, who borrowed the money from the defendant and delivered to him the notes of Elbert and the certificates. The money was borrowed and the notes and certificates delivered in 1876, and the notes were renewed from time to time. The certificates were transferred early in 1876, on the books of the company, into the name of the defendant, and continued to be held by him. In September, 1877, it was discovered that these certificates along with a large number of others, had been fraudulently issued by John S. Morton, the president of the company, and that they were altogether false and spurious. The plaintiff being utterly insolvent neither redeemed them, nor at any time offered to pay any part of the debt.

Upon proceedings instituted against the company, it was determined that as against persons who had paid for the stock, or advanced money upon the faith of it, the company was estopped from denying its legality, and was bound to either issue genuine shares, or pay value for those which were false. The court in which those proceedings were conducted specially decreed that Josiah Kisterbock was entitled to receive certificates for 300 genuine shares of the stock, or, in case of his refusal to take shares, he could take \$75 per share in money for the spurious shares held by him. He elected to take the 300 shares, and did so, and it is these shares which the plaintiff claims to have decreed to him upon payment of the debt and interest due to Kisterbock. The latter claims they are

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his absolutely without liability to account to the plaintiff for anything connected with them.

It is entirely undisputed that the plaintiff never bought these shares, and that when they were pledged to Kisterbock he alone advanced all the money that was advanced upon them and on the faith of their genuineness.

It has not been found as a fact by the master, in the present case, that the plaintiff was ever the owner of these stocks, or that he ever paid any money for them or advanced any money on them to Morton or to any other person. The plaintiff alleged that there was a large balance of account due to him by Morton from the year 1870, and that he received these shares, or was entitled to hold them as security, for the payment of that indebtedness and of other and further indebtedness due upon an accounting. But he also alleged and testified that he borrowed money for Morton on the shares of West Philadelphia Railway stock, giving his own notes, and pledging the certificates of stock as collateral. The whole subject of these transactions, and of Elbert's claim, both as a creditor of Morton upon an accounting, and as a lender of money to Morton upon faith of these stocks, was thoroughly and most fully considered and decided by the master in the present case, when acting as master in another case, in which Elbert claimed to recover for the value of shares of stock in the same company pledged to Isaac Jeanes & Co. The master then reported that there was no sufficient evidence before him to prove the alleged indebtedness of Morton to Elbert, and he ruled that if the false stock certificates were delivered to Elbert as security for an antecedent debt, he was not a holder of them for value. The master further held in that case that the true subject of the pledge was, not shares of stock, but a right to be indemnified for the fraudulent acts of the company's officers, and, even conceding that the plaintiff had an interest in the stock, to that extent it passed to Jeanes & Co. when they advanced money on the faith of the stock, and that it was fully asserted and availed of by them. The master also held that the new shares issued to Jeanes & Co. were lawfully disposed of by them under powers contained in the pledge, without liability to account to Elbert, and he therefore recommended a decree dismissing the plaintiff's bill. On excep-

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tions filed, the master's report was overruled by the Common Pleas and the plaintiff was held to be entitled to a recovery.

While the record of that case was in that condition the present case came before the same master, and in obedience to the decree of the court in the *Jeanes* case he declined to sustain his own views, but reported that the plaintiff was entitled to a decree, because the Court of Common Pleas had so decided in the case of *Jeanes*. Since then, however, this court sustained the master's report in that case and reversed the decree of the Common Pleas: *Jeanes's App.*, 116 Pa. 573. We, however, then considered but the one question of the power of the pledgees to sell the pledge and the lawfulness of its exercise. That question does not arise in this case, as the pledgee here still holds the new shares of stock issued to him in exchange for the false shares received from *Elbert*.

Upon a present examination of the report of the master in the *Jeanes* case we fully approve the views expressed by him as to the true character of the pledge. It was not a pledge of shares of stock, but simply of a right to receive indemnity for the fraudulent acts of the officers of the railway company in issuing the spurious shares. The master in thus regarding the subject simply followed the ruling of this court in the case of *Mount Holly Paper Co.'s App.*, 99 Pa. 513, in which *SHARSWOOD, C. J.*, speaking of the right of the pledgees of certain other false shares of the stock of this same West Philadelphia Passenger Railway Company by the same *John S. Morton* and other officers of the company, said: "Their claim on the company was not, indeed, on the stock. It was a claim to be indemnified for the fraudulent acts of the officers of the company from which they allege that they have suffered damage." In the original proceeding in the suit of *Swain et al. v. The West Phila. Pass. Railway Co.*, the master based his report upon the proposition that, "the liability of the railway company arises on the principle of estoppel which the necessities of trade and commerce require. Stock certificates issued by a corporation having power to issue, are a continuing affirmation of the ownership of the special amount of stock by the person designated therein or his assignee, and the purchaser has a right to rely thereon and claim the benefit of an estoppel in his favor as against the corporation;" citing *Holbrook v. Zinc Co.*, 57 N. Y.

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616; *Willis v. Darby Railway Co.*, 6 W. N. 461; *Bahia & San Francisco Railway Co.*, L. R. 3 Q. B. 585; *Bank of Kentucky v. Bank*, 1 Pars. Eq. 180. Undoubtedly this is the correct principle upon which to administer relief in all such cases.

This being so, it will be seen at once that the right to relief depends upon the equity of the person claiming it. If he has expended money upon the faith of the official certificates of the officers of the company, he has a right to be indemnified, to the extent of his expenditure, against loss from false certificates, but only because of the fact of his expenditure. The false certificates are no certificates in legal contemplation, and give no rights of their own force. But the act of the officers in issuing them, having been accepted and acted upon by another, the company cannot be heard to deny the truth of the fact represented. It is simply the application of the principle well expressed in *Freeman v. Cooke*, 2 Exch. (Welsb., H. & G.), 654, and *In re Bahia & San Francisco Railway Co.*, supra, that, "If you make a representation with the intention that it shall be acted upon by another, and he does so, you are estopped from denying the truth of what you represent to be the fact." But if what was pledged by Elbert to Kisterbock was not shares of stock, but a right to indemnity on account of a good faith advancement of Kisterbock's own money, made by Kisterbock himself, it is difficult to understand upon what principle the plaintiff is entitled to any recovery upon any view of the facts of this case. There is no finding on this record that Elbert ever owned or bought or paid a dollar of money for these particular shares of stock. They were not even *prima facie* his, as they were issued in the names of other parties and were transferred into the name of Kisterbock immediately after he received them. Elbert was himself examined and cross-examined as a witness at great length. But he gave no testimony as to his acquisition of these particular shares which were delivered to Kisterbock, nor to any of the facts of the transaction. He said he received very many shares from Morton, that those he received in 1870 were as security for the indebtedness due him by Morton, and that he also received shares upon which to borrow money for Morton. He had no written pledge of any of the shares nor could he state any oral pledge of the same. At the end of a long examination on this subject he

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was asked: "Q. Then all the pledge that ever was made, there being no written pledge, orally, was by giving stock in the way that the stock was given? A. Yes, sir." In answer to another question he said, "I held all that stock as collateral for indebtedness to me." This was 2567 shares including the 300 of Kisterbock and all designated in a letter of January 11, 1877, from Morton to him.

There is no finding that Elbert ever advanced any money on the shares delivered to Kisterbock, either to Morton or to any one else. There is not even a finding that they were delivered to Elbert as security for an antecedent indebtedness due by Morton to him, or even that there was such indebtedness. But if there had been such a finding, or if such had been the fact, Elbert would not have been entitled to any relief on that account as against the company, because, in that event Elbert parted with nothing on the faith of the certificates, and he would fail to bring himself within the principle upon which alone indemnity could be given, or was in fact given, when the decree was made in the case of Swain et al. v. the company. Even granting that because Elbert gave his own notes for the money borrowed from Kisterbock, and therefore had an interest equal in extent to that of the latter, it was the advancement of money and not the giving of notes which conferred the right to indemnity, and all the relief that could be given, or was given for that cause, was actually and properly given to Kisterbock.

There could not be a right to indemnity to Kisterbock and a further right to indemnity to Elbert arising out of the same transaction. Most clearly Kisterbock was entitled to it, but when it was given to him equity was satisfied; the subject was exhausted. Elbert could suffer no injury on account of the notes, because Kisterbock held them, and he having accepted the new shares in full payment of the debt for which the notes were given, of course could recover nothing from Elbert. Kisterbock had the alternative of accepting seventy-five dollars per share in money for the false shares, or instead thereof three hundred new and genuine shares. Had he accepted the money it would have been an end of the matter and the present case would never have been heard of. But he chose to accept shares instead of money. Why should there be any difference

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to him in the result of his accepting one or the other of the alternatives? What he took, and what he had a right to take, was indemnity, such indemnity as the law could give him. But it was his, not Elbert's; his absolutely, not conditionally. It was personal to himself, not because of the certificates which he received from Elbert, but because he, as an individual, had parted with his own money upon the faith of certifications made by the officers of the company, the truth of which certifications the company could not be permitted to deny as against Kisterbock. This was something which never belonged to Elbert and which he never passed to Kisterbock. If Kisterbock had never advanced the money, he would never have held this right to indemnity, even though he might have held the false certificates.

It follows that the trust which is a quality of pledge, and goes with it ordinarily, did not go with, and never attached to, this right to indemnity. It was a right which only came into existence in favor of Kisterbock, not by force of the pledge, but by force of his good-faith advancement of his own money. It was never clogged with any trust in favor of Elbert, because the fact upon which alone it was founded had no existence with Elbert, or in his favor, or in consequence of any money or property parted with by him. It was the money which Kisterbock parted with, which *created* the right to indemnity, and that money was his alone, and its advancement was the sole basis upon which the decree was made in the original case. These views are radical and reach to the very foundations of the plaintiff's claim of title to equitable relief. They are in hostility with such claim and require a reversal of the case upon its ultimate merits.

The decree of the court below is reversed at the cost of the appellee, and the bill is dismissed with direction that all the costs of the case be paid by the plaintiff.

On November 4, 1889, a motion for a re-argument was refused.

APPEAL OF SAMUEL HUSTON.

[HUSTON, TO USE, V. CLARK, ET AL.]

FROM THE DECREE OF THE COURT OF COMMON PLEAS NO. 1
OF PHILADELPHIA COUNTY, IN EQUITY.

Argued January 21, 1889—Decided October 7, 1889.

- (a) Huston, Clark and Sellers were the owners of nearly all the stock of a manufacturing corporation which in 1873 was practically insolvent. Huston had guaranteed a large part of the corporate indebtedness, and all had made advances to the company, each to an amount over \$100,000:
- (b) On May 13, 1873, a written agreement was entered into, wherein it was provided that Huston, in consideration of being indemnified by Clark and Sellers against all his liability for the debts of the company, should assign to Clark and Sellers all his stock and the bonds and a note of the company held by him:
- (c) Clark and Sellers agreed to contribute each a like amount with Huston of the bonds and notes of the company, the fund thus created to be called the guarantee fund; the surplus that should remain after payment of the corporate indebtedness, other than that in the guarantee fund, was to be divided among the parties who had contributed to the fund:
- (d) Although Huston assigned his stock, bonds and note, as agreed upon, Clark and Sellers did not pay into the guarantee fund the amounts provided by the agreement, but merely credited themselves with advances previously made by them to the amount due by them to the fund, and divided between themselves the bonds assigned by Huston:
- (e) Clark and Sellers then took charge of the works of the company and made fresh advances to the amount of \$270,000. Finding, as alleged, that the business was unsuccessful, they permitted the works to be sold under legal process of which Huston had notice, bought the property in, and organized a new corporation.
1. In such case, the advances made by Clark and Sellers prior to the agreement were debts to be paid by the guarantee fund, and their taking credit for such advances did Huston no harm. Clark and Sellers were not the agents of Huston in the subsequent conduct of the business, and they were not bound to include him in the purchase and reorganization. Huston, however, was entitled to an account, so that it could be ascertained if anything were due him from the guarantee fund, after payment of the company's debts.

Before PAXSON, C. J., STERRETT, CLARK, WILLIAMS, MOCOLLUM and MITCHELL, JJ.

Statement of Facts.

No. 138 July Term 1888, Sup. Ct.; court below, No. 373 March Term 1882, C. P. in Equity.

To the number and term of the court below, above stated, Samuel Huston, to the use of Charles P. Perot, assignee for the benefit of creditors, filed a bill in equity against E. W. Clark, William Sellers and John Sellers, Jr., praying for an account, and a decree that so much of the property of the Midvale Steel Company as was purchased or obtained by the defendants by means of the plaintiff's stock, bonds and property assigned to them, should be transferred to the plaintiff, or its money equivalent paid to him.

From the testimony taken before *Mr. Amos Briggs*, examiner and master, it appeared that in 1873 Samuel Huston, E. W. Clark and William & John Sellers were the owners of practically all the stock of the Midvale Steel Works, a corporation organized under the act of July 18, 1863, P. L. (1864) 1102. Huston was president of the company and had advanced to it up to January 1, 1873 about \$311,000. In May 1873, the company was practically insolvent, and a large part of its indebtedness had been personally guaranteed by Huston. On May 13, 1873, it appeared that the company owed E. W. Clark \$108,910 for advances and William and John Sellers, \$121,750 for advances. To other parties it was indebted in the sum of \$611,862.

On the date last mentioned, an agreement in writing was entered into between Huston of the one part, and E. W. Clark and William and John Sellers of the other part, which was as follows:

"Whereas: The said party of the first part is liable, as maker of a certain promissory note, made for the accommodation of the Midvale Steel Works, for the sum of twenty thousand dollars, and is also liable upon certain notes endorsed by him, for the accommodation of said works; and Whereas: He has also joined with the parties of the second part in guaranteeing other notes of said works, on terms and in proportions agreed upon between them; and Whereas: These liabilities amount to a large sum, and he, the said party of the first part, may be unable to pay them when the said liability shall become fixed and ascertained; and Whereas: The said party of the first

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part is the owner of two thousand and thirty-two shares of the common stock, and two thousand two hundred and eighty-eight shares of the preferred stock of said works, and fifty thousand dollars of its bonds, and also holds a note of said works to the amount of fifty-one thousand five hundred dollars; and Whereas: He has heretofore pledged fifty shares of the stock of the Philadelphia Insurance, Trust and Safe Deposit Company, belonging to him, as security for the said note of twenty thousand dollars, made by him, which is now held by the Fidelity Insurance, Trust and Safe Deposit Company; and Whereas: The said party of the first part has agreed with the said party of the second part that, if they will indemnify him against all debts of the said Midvale Steel Works, he will, on the terms hereinafter mentioned, assign, transfer and set over to said party of the second part, his said stock, bonds and note of the said works, and the said fifty shares of the stock of the Philadelphia Insurance, Trust and Safe Deposit Company, so pledged by him as aforesaid, and all the property pledged by him for said works, or to secure his liabilities for it; and the said parties have agreed to give said guarantee.

"Now the said party of the first part, for and in consideration of the premises, and of the sum of one dollar, to him in hand paid by the said party of the second part, the receipt whereof he acknowledges, and of the covenants hereinafter contained, has assigned, transferred and set over, and does hereby assign, transfer and set over to said party of the second part, all his said above-mentioned stocks, bonds, and note of the said Midvale Steel Works, and the said fifty shares of stock of the Philadelphia Insurance, Trust and Safe Deposit Company, so pledged as aforesaid, and generally all property belonging to him, the said party of the first part, which now is or may be pledged or hypothecated with any creditors of said works, or any person or persons holding any note or notes made, endorsed, or guaranteed by him for the accommodation of said works, to have and to hold the same to them, the said party of the second part, their executors, administrators, and assigns, with full power to sell, pledge, or otherwise dispose of the same in the administration of or settlement of the affairs of said works, or in or for payment or the security of its debts, or any of them, or otherwise, as they, the said party of the second part, may

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deem best. And the said parties of the second part, for themselves, their executors, administrators, and assigns, in consideration of said assignment or transfer, and of the premises, do jointly and severally covenant, promise, and agree to and with the party of the first part, his executors, administrators, and assigns, that they now and at all times hereafter forever will save, protect, defend, indemnify, and keep harmless him the said party of the first part, his executors, administrators, from and against all and every of the debts, obligations, or liabilities of the said Midvale Steel Works whatever the same may be, and from and against all suits, claims, actions, causes of action, debts, dues, damages, or demands against him arising out of his relation to or connection with the said steel works, either as president, director, or stockholder or otherwise, or as maker, indorser, or guarantor of any notes of or claims against said works.

"And the said parties of the second part, do for themselves, their executors, administrators, or assigns, jointly and severally covenant and agree, that they will severally contribute a like amount of bonds, notes, and other securities, as Samuel Huston does hereby contribute or agree to contribute; that is to say, that the said William and John Sellers, Jr., as one party or person will contribute fifty thousand dollars in bonds of said company; fifty-one thousand five hundred dollars in notes of the said company; and the said Edward W. Clark will contribute a like amount. And the said William and John Sellers, Jr., as one person or party, and the said Edward W. Clark, will further each contribute stock equal in value to the said stock so heretofore pledged by the party of the first part, to or with the holders of his note, so made as aforesaid, for the accommodation of said company. All of which stock, bonds, and securities, hereby assigned and to be contributed, shall constitute a fund to be called the guarantee fund, for paying the debts of the said works other than the debts constituting or belonging to the said guarantee fund itself. And if after paying the said debts, bonds, notes, or liabilities to others, any surplus shall remain, all securities other than the bonds or notes of said works in or belonging or contributed to the said guarantee fund, shall first be returned or made good in kind or value to the party contributing the same; and if after they shall

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be so returned or made good, the parties to this agreement, the said William and John Sellers, Jr., for said purpose being treated as only one person or party, shall divide said surplus between them, in proportion to their several interests in the bonds and notes remaining in said guarantee fund, that is to say, said surplus shall be applied pro rata towards paying the notes and bonds in said fund, contributed by the parties thereto; and if, after paying all the said bonds and notes in or belonging to said fund a surplus shall remain, the same shall be divided among all the stockholders of said works, in proportion to the amount of stock which they may severally hold."

In pursuance of the foregoing agreement, Huston transferred to Clark and William and John Sellers the stocks and securities mentioned therein. The defendants took charge of the works and paid the most pressing debts. They did not transfer, however, to the guarantee fund the securities they were to transfer under the agreement, but merely credited themselves with the advances made by them prior to May 13, 1873, to the amount promised by them to the fund. They also divided Huston's bonds in the guarantee fund and transferred them to their own names. They continued operating the works, and made additional advances to the extent of \$270,000. In 1880, the interest on one of outstanding bonds being in arrear, suit was brought on the bond, and judgment obtained against the company. Execution was issued upon the judgment and the property was sold thereon to the defendants for \$450,000. The defendants then organized a new company under the name of the Midvale Steel Company. The facts connected with this sale, the plaintiff's notice thereof, and the general conduct of the parties, are stated in the opinion of the Supreme Court.

The master found that owing to a failure to file an annual statement of stocks, assets, etc., as required by §§ 33, 34, act of July 18, 1863, P. L. [1864] 1102, under which the Midvale Steel Works were incorporated, all the stockholders were liable as general partners; that the defendants had no right to appropriate any part of the guarantee fund to the payment of advances previously made by them; that the defendants were acting as agents for Huston under the agreement, and that Huston was entitled to an interest in the Midvale Steel Company coextensive with his interest in the old company at the

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time of the sale, and that defendants should account to him accordingly.

To the report of the master, the defendants filed seventy-eight exceptions, which were overruled by the master and being filed with his report were renewed before the court.

On June 9, 1888, the said exceptions having been argued, the court in banc, BIDDLE, J., filed the following opinion:

It appears that previous to May 13, 1873, Mr. Huston had made himself liable for the debts of the Midvale Steel Works to a very large amount, which neither he nor the steel works were able to pay. Under those circumstances he agreed with the defendants that if they would indemnify him against all debts of the Midvale Steel Works, and from all demands against him arising out of his relation to or connection with the said steel works, either as president, director, stockholder, or otherwise, or as maker, endorser, or guarantor of any notes of, or claims against, the said works, he would assign to them certain securities. To this the defendants assented, and on May 13, 1873, an agreement to that effect was reduced to writing. By this writing the defendants were to contribute to a guarantee fund double the amount contributed by the plaintiff, but neither party was to contribute their stock in the steel works to the guarantee fund, the plaintiff's assignment to the defendant of his stock being made solely for the purpose of assuring to them the absolute control of the management of the corporation. The defendants, in the administration or settlement of the affairs of the works, or in payment or security of its debts, or otherwise, were to use the guarantee fund as they might deem best. They were to save the plaintiff harmless from all debts of the steel works, and from all liability incurred by him therefor. If, after the payment of the debts of the steel works any surplus should remain, it was to be applied to make good to the parties contributing the same all securities in the guarantee fund other than the bonds or notes of the works; to return or make good to the parties contributing the same their bonds or notes of said works which had been placed in the guarantee fund; and, finally, to divide any surplus still remaining among the stockholders. Under that agreement the rights and duties of the parties must be deter-

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mined and the case decided. The defendants are undoubtedly bound to account under its provisions for the property of the plaintiff placed in their hands. This they allege they have been always ready and willing to do, and the evidence in this case, it seems to us, proves conclusively that all the property which was received by the defendants under the agreement of May 13, 1873, was properly held and used by them and has been fully and correctly accounted for.

This, however, is not the real point in controversy in this case, but the contention arises under an allegation, in which the learned master concurs, that the scope of the agreement is much broader than the effect given to it by the exceptants, and that "the agreement constitutes the defendants agents for Mr. Huston to manage and administer the affairs of the steel works, not merely for themselves, but for the joint account of all the parties to the agreement." It is upon this utterly inadmissible assumption that a most elaborate and ingenious argument has been founded. It is contended that, although the works were subsequently sold under a prior mortgage, bearing date October 1, 1872, covering all its franchises, real estate, and fixtures, after the guarantee fund had become exhausted, and when the company owed the defendants \$480,969.17 in excess of their contribution to the guarantee fund of \$341,127.52, that Mr. Huston still had some interest in the property after the sale. This mortgage was foreclosed under judicial proceedings instituted in Court of Common Pleas No. 3, after a full advertisement and hearing, with the knowledge of Mr. Huston, and the proceeds distributed under a master, Mr. William Sellers becoming the purchaser for the sum of \$450,000.

Mr. Huston certainly contributed nothing to the purchase-money, and there is not a particle of evidence that the purchaser was his agent. They were both stockholders in a corporation whose property was sold under an order of court. This, of course, extinguished the stock of the old company, and wiped out not only the stock and credits of the plaintiff, but the stock and credits of the defendants. They purchased the property with none of these stocks and credits, but with their own cash and bonds in excess of Huston's, after applying as many bonds, or their equivalent in money, as he did, to the debts of the company. We utterly fail to see what possible

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interest Mr. Huston has in the new company, or why he is entitled to the same proportion of capital stock of the new company that he held in the old.

As the allegations in the bill, charging fraudulent conspiracy or confederacy, were withdrawn on the argument of the case, we are unable to see anything in it but a very simple business operation, by which the plaintiff has received all the protection the defendants contracted to afford him. The exceptions to the master's report are therefore sustained and the plaintiff's bill dismissed with costs.

A final decree having been entered, the plaintiff took this appeal, assigning as error, in eighty-one several assignments, the decree sustaining the defendants' exceptions to the master's report and dismissing the plaintiff's bill.

Mr. A. T. Freedley, for the appellant.

Mr. Geo. M. Dallas and *Mr. John G. Johnson* (with them *Mr. Geo. L. Crawford*), for the appellees :

OPINION, MR. JUSTICE MITCHELL :

Owing to the number of the exceptions to the report of the master, and the brevity of the opinion of the court below, sustaining them as a whole without separate consideration, this case is presented in the form of a review of the master's report rather than of the judgment of the court itself. But a detailed consideration of the eighty-one assignments of error, or even an attempt to classify them, would be tedious and unprofitable, and we therefore prefer to present our view of the whole case, in the natural order of the substantial questions raised.

1. We proceed therefore to consider, first, *the parties and the situation*.

The parties were the owners of practically the whole stock of the Midvale Steel Works, and had made advances to carry on its operations which had been unsuccessful. Appellant was the president of the company and had advanced a very large portion of his private fortune to sustain it. The other parties had also made advances, but not nearly to the same extent, either in actual amount or in proportion to their other

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means. It is not shown that there was any duty to make these advances, or that they were not entirely voluntary. The questions therefore of the relative amounts advanced by the different parties, and by whose fault such advances were made necessary, discussed before the master, are not of any importance. Nor, in view of the subsequent agreement is it at all material whether or not there was any express promise of contribution at the time appellant made his principal advances.

In January, 1873, appellant, finding his means exhausted and his health failing, called upon the appellees for further financial aid. The result was that the advances of all the parties to the company were liquidated and settled, to that date, by the issue to all of them of additional stock, and to appellant the issue also of certain first mortgage bonds and a note of the company. Thereupon appellees assumed the active administration of the company's affairs, and began to make large additional advances of money. Matters continued thus until May, 1873, when the appellant's mental health having become seriously impaired, and the appellees having made very large advances, a consultation was held which resulted in a written agreement.

Before proceeding to the consideration of this agreement it may be well to dispose of a collateral matter. It is set forth in the bill that in January, 1873, "the plaintiff was not in the condition of mind to be able intelligently to protect his interests," and that on the 13th of May (the day of the signing of the agreement), "plaintiff's mind was so seriously affected that he was totally incapable of understanding any business matters whatever." It would be sufficient to say that these are mere obiter suggestions which are not made the ground for asking relief, and which might therefore be passed over as surplusage. No averment is made that any fraudulent advantage was taken of appellant's condition, or that any other or more beneficial arrangement was proposed for his interests, nor is there any prayer for the rescission or re-formation of the agreements. But it is proper to say that even now, with all the light that full investigation and subsequent developments give us, it does not appear what better arrangement for appellant's interest could have been made. The corporation was clearly insolvent if not bankrupt. Two courses only were

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open ; either to wind up the corporate business at once and face the loss directly, or to go on and put more money in, with the hope of ultimate recoupment. By the former, appellant would occupy the position of a preferred creditor (and apparently the only one at that time) on first mortgage bonds for \$50,000, and on general account for \$51,000 on note ; but, on the other hand, he had made himself personally liable to such an extent that if there should be a deficiency of assets on the liquidation, his whole private fortune was gone, and his right to any contribution from appellees at least doubtful. The appellees chose to go on, in the hope of a smaller loss in the future, if indeed they can be said to have had a choice at all. In the language of one of them, William Sellers, "it was our desire to sell the works, and close out, but we had so much invested that we could not afford to stop, provided we could go on and retrieve ourselves at all." From this course however, appellant, even if he had preferred it, was apparently barred by want of means, as well as by his condition of health. In this situation he accepted the agreement of the appellees to indemnify him from all further liability, and took his chances of ultimately saving something from his bonds and stock.

In making this agreement appellant was represented by his brother and son, and by his counsel, as competent, strenuous and indefatigable an adviser in complicated business matters as this bar could furnish, the late Chapman Biddle. The draft of the agreement is in his handwriting, and it would be difficult to convince any one who ever knew him professionally, that any point in his client's favor was either overlooked or surrendered without a full equivalent.

The allegations as to appellant's mental condition cannot therefore be taken as any part of the substance of the present bill, and the agreement of May 13, 1873, must be accepted as the foundation of the subsequent rights of the parties.

II. *The agreement and the respective rights of the parties under it.*

The agreement stipulated for two things, first, the assignment by appellant to appellees of all his stock, bonds and note of the corporation, and all his other property theretofore pledged for its debts ; in consideration of which appellees indemnified him against all personal liability for the debts of the corpora-

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tion, and all demands against him "arising out of his relation to or connection with the said steel works;" and secondly, appellant's bonds and note of the corporation, and his other pledged stock (not including his steel works stock), together with like amounts of the same or equivalent securities to be contributed by each of the other parties, were to constitute a "guarantee fund for paying the debts of the said works, other than the debts constituting or belonging to the said guarantee fund itself." And if there should be any surplus, it was to be devoted first to the return, in kind or value, of the outside stocks contributed by the parties, next to the parties in proportion to their company bonds and stocks in the fund, and lastly pro rata to all the stockholders of the steel works.

The intent of this agreement is perfectly clear. Appellant, who had been succeeded by Mr. Sellers in the presidency of the company three days before, retired from all participation in the conduct of the business, and surrendered the control of his stock and bonds to the appellees. In consideration thereof, he was indemnified from further liability, but retained his right to a share of the surplus, should there be any after settlement. On the other hand, appellees took upon themselves the conduct of the works, either to wind up or to continue, with unlimited control over the whole business and assets, including appellant's bonds, notes and stock, subject only to the restrictions as to the guarantee fund, and to the duty to indemnify and account.

The guarantee fund, except to the comparatively insignificant extent of appellant's Phila. Ins. and Safe Deposit Company stock previously pledged, and the stock of equivalent value which appellees were to furnish, was not a contribution of fresh capital. With that exception it consisted of claims against the company itself, and the effect of the formation of the fund was to create a class of deferred or subordinated claims, payment of which was to be postponed till all the other debts of the company had been satisfied. Some of the claims, possibly all of them, but especially the first mortgage bonds, were in such shape as to be capable of being used in payment or as collateral security for other debts, or for advances of money, if other creditors or capitalists could be found willing to take them for such purpose, and apparently such use was contem-

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plated. But it did not prove practicable to any important extent, as according to the testimony of Wm. Sellers they could only be used as additional collateral with other securities, and were of little aid by themselves in raising money. The principal effect, therefore, of the guarantee fund was to lessen the amount of debts requiring immediate provision to meet. For this purpose appellant put into the fund and thereby deferred his claim upon bonds, etc., amounting in round figures to \$107,000, and each of the other parties agreed to contribute, and thereby postpone, an equal amount. But it is entirely clear that this was the extent of the appellees' obligation to postpone their claims.

It was argued with great earnestness in behalf of appellant, and the learned master adopted the view, that the guarantee fund was not postponed to the claims of appellees for advances made prior to the date of the agreement, and therefore that no part of that fund could be used to repay such advances. The learned master enters into an elaborate consideration of the act of July 18, 1863, under which the steel works were incorporated, and finds that from neglect to file the annual statement of stock, assets and liabilities, etc., of the company, all of the parties were liable jointly and severally with appellant for the debts of the corporation. He then proceeds: "It therefore seems quite clear to me that at the time the agreement of May 13, 1873, was made, Mr. Huston and the defendants being joint owners of the works and of its assets, and directors of the corporation, who had neglected to comply with the act of July 18, 1863, they were jointly and severally liable to the creditors of the works for the payment of the debts of the corporation. And if one of them under that liability should pay more than his proportion, he could call on his fellow-members for contribution so as to equalize the payments.

"With this understanding let us consider to what extent the relation of the parties is changed by the agreement of May 13, 1873.

"The defendants, by that agreement, undertook to pay the debts of the steel works, then existing, to other creditors. It did not affect the rights of the parties, in relation to their claims against the steel works, for advances made for their use prior to the agreement; nor did it give any of the parties an

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advantage over the other, so far, as the assets which constituted the guarantee fund were concerned. As to those assets, each party having contributed an equal portion, all of the parties stood on equal terms. While the defendants had the management and control over the 'fund' for the payment of the debts due other creditors, they possessed no proprietary interest in Mr. Huston's contribution to the fund. The contribution was not made to benefit the defendants, but to pay or to secure other creditors; and the defendants possessed no power to make the guarantee fund answerable for their advances to the steel works prior to the period of the making of the agreement; nor, indeed, to make it answerable for any of their advances, even after the agreement was made, except to the extent of equalizing the excess arising from the property of one in the 'fund' being used to a greater extent than another's."

The difficulty with this view, and it is fundamental, is that it sets aside the agreement which the parties made for themselves, and substitutes an entirely different one, based on different considerations, and with wholly different results. Nothing is more dangerous than the so-called equity which undertakes to readjust rights or differences which the parties have settled for themselves, and in the absence of fraud or imposition, or such ignorance on one side as is equivalent to fraud on the other, nothing is more absolutely indefensible. No question as to outside creditors appears in this case, either then or now, and the discussion of the act of 1863 is wholly irrelevant. Whether appellees were then liable to outside creditors for the general debts of the company or not, or whether they were liable to appellant for contribution or not, was and is entirely immaterial. Appellant was by his own acts expressly liable to such creditors, and appellees relieved and indemnified him from such liability. That of itself was ample consideration for any rights appellees may have acquired under the agreement, even if the agreement had been open to question. But the parties having settled their rights themselves, no further discussion is permissible, and the agreement, according to the intention of the parties, must be carried out as the law of the case.

The language of the agreement is entirely clear. The guar-

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antee fund is "for paying the debts of the said works, other than the debts constituting or belonging to the said guarantee fund itself." It is not to pay debts due to *other parties* than the contributors to the fund, but *other debts*, not constituting part of the fund itself. The language clearly refers to specific debts, not to the persons of the creditors who may hold them. In fact at that date appellant was a creditor, as already said, in the sum of \$107,000, and that amount he postponed, as to payment, by putting it in the guarantee fund, and each of the other parties postponing his claims to the same extent, made up the fund of \$321,000, by which amount the debts of the corporation urgent for payment were reduced, and the company to that extent freed from immediate pressure. As to any other debts due then, or subsequently incurred, the appellees (or the appellant if he had made subsequent advances), stood upon the same footing as any other creditors.

III. *What was done under the agreement.*

Appellees proceeded at once to the payment of the pressing debts of the works, and between the date of the agreement and the middle of September they had made fresh advances to the extent of \$270,000.

The master reports that they did not comply with their agreement as to the guarantee fund, and if we regard the strict form of what was required, they certainly did not. No separate account was opened for the guarantee fund, nor were any bonds or notes or other corporation stocks specifically set apart for it. On the contrary, the bonds of appellant were very shortly after the agreement divided between the appellees, and transferred to their individual names. But the master's report rests upon the erroneous view, already discussed, that the guarantee fund could not be used to repay advances by the appellees, over and above their contribution to the fund itself.

At the date of the agreement Clark had advanced to the works \$108,910, and the Messrs. Sellers \$121,750. They might have put into the fund the bonds, etc., strictly as called for by the agreement, and immediately have taken them out again to pay these advances. But the business view of the matter was to regard these sums as their contribution in advance to the fund, and such in effect though not in form, they really were. Treating these advances as part of the guarantee

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fund, and paying other debts by fresh advances out of their pockets, was the same as putting the fresh advances in the fund and then using the fund to repay these old advances, and this, as we have seen, they were entitled to do. Even the law which in general requires not only the right thing to be done, but also in the regular way, avoids useless circuitry, and equity must certainly regard the action of the appellees as a compliance in substance with their agreement in this regard.

Appellees continued to operate the works, at first at a loss, but with a gradual improvement until the fall of 1880. There seems to be little doubt that all the parties at the time of the agreement expected the business to be wound up at an earlier date than this, but we do not find in the agreement or elsewhere any restriction upon the authority and discretion of the appellees in this respect. In this interval differences had arisen between the appellant and the appellees, and some litigation, which however, it is not material to discuss.

In the spring of 1880, the interest on the first mortgage bonds of the works being in arrear, suit was brought by Clarence H. Clark, a holder of some of the bonds as collateral for loans made to his brother, appellee Clark, and upon a decree of the Court of Common Pleas No. 3 of Philadelphia, the works were sold, October 30, 1880, to William Sellers for \$450,000, and a new corporation called the Midvale Steel Company was immediately formed by the appellees, to continue the same business, with the same property, and at the same place. These facts and that the suit was brought with their knowledge and concurrence are frankly admitted by appellees, and constitute the gravamen of the appellant's case. He claims (par. VIII.—XIV. of the bill) that the foreclosure and sale were part of a scheme to oust him from the company, and that the parties being in the position of trustees for him, could not by any such acts discharge his interest in the works, and therefore that he is still entitled to the same proportionate interest in the new corporation that he had in the old.

IV. We have therefore to consider *the sale, and the duties of appellees in regard to it*, either to stop it, or to include appellant in the purchase and reorganization.

The sale was under process issued by the Fidelity Company, trustee, in the Court of Common Pleas No. 3. It was con-

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firmed by that court, and the proceeds distributed by an auditor under its direction. No allegation is made of want of notice, or of any unfairness (other than the general purpose already referred to), or of inadequacy of price, and no application was at any time made by the appellant to the Court of Common Pleas, to set it aside or alter its terms. Under such circumstances the sale is not now open to question.

Nor is any allegation made in the bill that appellees should have stopped the sale. It is however argued that as the sale was only for non-payment of interest on the bonds, and as the profits of the works at that time produced sufficient funds to pay such interest, it was the duty of appellees as quasi trustees, managing the business for the benefit of appellant as well as themselves, to pay the interest and retain the property. Let us look at the situation. Appellees had as already shown, taken charge in the beginning of 1873 when the works were insolvent, and the appellant certainly, and perhaps appellees too, liable for very large amounts of the corporate debts. They had relieved and indemnified appellant from this liability, had advanced \$270,000 within a few months to pay these debts, had carried on the works for several years at a loss, and now after a lapse of seven years, clearly a much longer period than any one had contemplated when the undertaking was begun, they had brought the works to a condition which was profitable in the sense of producing more than its working expenses (or, as the books express it, showing a profit on manufacturing account), but making no progress in the reduction of their debts. The works were going behind; says Mr. Wm. Sellers: "They never were able to make their interest. The interest on the debts always amounted to more than the profits. The manufacturing might show we made a profit, but when we came to close up the books that was all absorbed, and more too. We were going behindhand." Under the agreement of May, 1873, appellees had an absolute discretion to wind up the business at any time their judgment dictated. They were responsible only for good faith. After so earnest and so protracted a struggle to keep going, it would seem to be beyond question that it was a wise as well as an honest exercise of discretion to abandon the effort, and when the opportunity came or was sought by means of the sale, they were under no obligation not to seize it.

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Were they under any equitable obligation to include appellant in the purchase and re-organization? This being a vital point in the relief claimed in the bill, it has been argued with great earnestness and ability by appellant's counsel, that the appellees were in such position as quasi trustees for appellant, that they could not buy at the sale of the common property to his exclusion. The principles of law are not disputed, but it is claimed with equal earnestness, that the facts do not warrant their application. A laborious examination of the testimony satisfies us that this position of the appellees is correct.

The situation in May, 1873, has already been stated, and the conclusion that the agreement of that date settled and determined the subsequent rights of the parties. That agreement clearly contemplated the absolute retirement of appellant from the business of the steel works. By it he was in terms relieved and indemnified from liability for their existing debts, and by manifest implication he was not to incur any new liability by anything that should be done in the future. The entire future management, and the resulting pecuniary responsibility, were upon appellees. All that appellant retained was a right to an account, and participation in any surplus that possibly might be left upon final settlement. That there would be any such surplus does not appear to have been thought probable. It is provided for in the agreement, but apparently more with a view to the disposition of the reserved or guarantee fund than to anything further. And all that I find in regard to it in appellant's testimony is where Dr. Charles Huston was asked, "Whether or not any statement was made by any of the defendants as to any benefit to be derived by the plaintiff in case the difficulties then surrounding the company should be removed," and he replied, "If there was anything left after paying the debts, it was understood by all, I think, that they should share in proportion to their ownership." The testimony of appellees on this point is very positive. "I am very sure," says William Sellers, "that either of us would have been willing to go out of the concern if we could have found anybody who would have relieved us from the responsibility of the concern at the time. I know so far as I am concerned I would have done it, and so stated at the time, that if anybody would

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relieve me of the debts of the concern I would be very glad to give up everything I had in it." In accordance also with the idea that appellant was out of the business, is the admitted expectation of all the parties that the business would be speedily wound up. Thus, in the examination of Dr. Huston: "Q. You have stated that the agreement of May 13, 1873, was executed with a view to the immediate sale of the works? A. As soon as a purchaser could be found. Q. Please state whether anything was said as to an indefinite carrying on of the business after the execution of that agreement? A. I have no recollection of that being in contemplation under any contingency." And again, William Sellers on cross-examination says: "It was contemplated that it should be wound up, but it was also contemplated that we should carry it on if we could not wind it up. . . . It would have been our choice to wind up, but we did not have the option."

The conduct of the parties was in accordance with this view. The works were carried on by appellees as already stated, at a loss for two years and a half, without calling on appellant for contribution, and when in the letters that passed between the parties in the fall of 1875 appellees suggested that they had carried a heavy burden, and asked if appellant could not now do something to assist, the only result seems to have been a rather angry interview the substance of which is contained in the statement of appellant himself: "If I was to do anything I would sell out my entire interest." From this time forward the relations of the parties became more and more antagonistic, litigation ensued as already stated, and by the time of the sale in the fall of 1880 the positions of the parties were openly hostile. Appellant could not have been deceived on this point, nor induced to slumber on his rights, under any impression that his interests would be identified with those of appellees. He had notice of the sale and the contemplated purchase. He knew that the latter meant the continuation of the business with the contribution of fresh capital, as well as the application of the old plant. The business had hitherto been unsuccessful, and might still be so. Even the promise of profit that it gave, was based on the sinking of more than a quarter of a million dollars of appellees' advances to the guarantee fund. Appellant had also a share in that fund, and he knew it would

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be sunk like the rest, unless recouped by the new start. He had been free from the liabilities of the business for seven years and a half, and he knew that the others meant to treat him as permanently out. Then was his time to speak, to come forward and assert his right, and proffer his contribution to the new venture. He did nothing, and as already seen, he does not even now question the propriety of the sale or the adequacy of the price. He has no equity now, after the labor and capital of the appellees have made the new venture successful, to claim a share on the ground that they were his trustees. The agreement of 1873 gave them the right to manage the works according to their own judgment, subject only to the duty to account. On a full review of the facts we are clearly of opinion that they were justified in considering the appellant as out of the business, and were under no obligation to include him in the new undertaking; and that even if these points were doubtful, appellant by allowing them to go on and engage in a venture to which he contributed nothing and had no liability, estopped himself from claiming a share, now that it has proved profitable.

It may still be however that appellant would have an equitable interest in the new company, if his bonds or other securities were used in payment of the purchase of the plant of the old works. The learned master was of this view, but it was based on the liabilities of the parties under the act of 1863, and his construction that appellees were not entitled to use the guarantee fund to repay their previous advances. "The conclusion seems to me irresistible," he says, "that every bond which the defendants took by the payment of the debts of the steel works, they received for the joint account of themselves and Huston." This construction of the rights of the parties under the agreement of May, 1873, has already been discussed, and as we are unable to concur in it, we are of course unable to accept this mode of reaching the conclusion that appellees paid for the property with the bonds of appellant, and must look into the facts as they actually occurred. As already said the course taken by appellees was not according to the strict tenor of the agreement. Instead of establishing the guarantee fund, as called for, and keeping it separate until the final liquidation, they took the business view, and did what they considered equiva-

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lent. So far as regards their own contribution to the fund, this has been already discussed, and found to be a substantial compliance with their agreement. With regard to the appellant's bonds, etc., it appears that soon after the agreement, they were divided between the appellees and formally transferred to their separate names. What the exact purpose of this action was, whether as part of the means of repaying appellees' advances, or for convenience in using the bonds as collateral for the large loans which appellees were likely to require, does not clearly appear, nor is it perhaps now material to inquire. Appellees from time to time repaid their advances by the issue of other bonds of the same kind, and at the time of the sale were the owners in their own right of practically the whole issue except appellant's fifty which stood in their names. Whether they were the real owners of these depended on the state of the guarantee account.

By the terms of the sale the purchase money was payable in cash, or, at the option of the purchaser, in the bonds secured by the mortgage under which the sale was made. By arrangement with the other holders all of such bonds then outstanding except the fifty that had belonged to appellant were presented by Mr. Sellers before the auditor, and allowed directly as part payment of his purchase money. The fifty bonds of appellant, contributed to the guarantee fund, were not used in payment, but were presented for a cash dividend which was allowed as cash to be paid out of the purchase money to Clark and the Messrs. Sellers. No cash actually passed on this account, and even if it had it would have made no difference, for a payment of cash immediately repaid as a dividend on the bonds, would in equity have to be treated as in substance the same as payment directly with the bonds themselves. We must therefore look to the substance of the payment, and doing so we find that appellees' own bonds were far more than sufficient under the terms of the sale to pay all the purchase money. The bonds represented a par value, available as purchase money, of \$449,000, as principal alone, and over and above this was interest amounting to about \$168,000 more. The number of bonds presented, therefore, merely affected the dividend that would be payable on each. The appellees, had they chosen, might have entirely omitted to present appellant's fifty bonds for

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any purpose. But in that case, as those bonds were part of the guarantee fund, they would have to be accounted for in the settlement of that fund, and appellees would have been chargeable in such settlement with the dividend to which the bonds would have been entitled out of the purchase money. Appellees, therefore, apparently recognizing the obligation to account, liquidated the dividend by presentation of the bonds, and receipting as for so much cash received upon them. This was the receipt of so much on account of the guarantee fund, which must be accounted for in the final settlement, but it cannot be regarded as the use of appellant's bonds in the payment of the purchase money of the works.

In paragraph IV. of the bill mention is made of twelve other bonds issued in the name of appellant. No basis or reason of issue is however stated in the bill, but in the answer it is averred that they were issued as collateral for notes indorsed by appellant, which were subsequently assumed and paid by appellees. It therefore appears that appellant had no absolute interest in them, and they may be dismissed from further consideration.

The steel works enterprise appears to have been unprofitable from the start, the losses to all the parties serious, and to the appellant, disastrous. Appellees through the fortunate possession of greater means and better health and working ability, have been able to rescue themselves and establish a successful business; but on a careful review of all the facts we do not find that they have attained success by any disregard of appellant's rights, or that they are responsible for the unfortunate result to him. There is therefore no ground on which he can be held entitled to any interest in the present company.

V. There remains to be considered only the question of accounting, and this we find the least satisfactory presentation of the case.

Under the agreement of May, 1873, appellant is entitled to an account of the guarantee fund, and as the equitable owner of stock, to a general account up to the time of the sale and closing of the steel works. Owing to the different views we take of the principles on which the account should be made up, we do not find the master's statement of much use. The opinion of the court below says that "all the property received by

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the defendants under the agreement has been fully and correctly accounted for," but unfortunately, from its extreme brevity, does not refer us to the evidence on this point. A great mass of figures, much of it entirely irrelevant, is presented in the testimony of the book-keeping experts, Heins and Burke. Possibly all the necessary materials are there. Indeed we gather from the general tenor of the argument that on the basis, which we hold to be correct, that appellees were entitled to apply the guarantee fund to the repayment of their own advances in excess of their proportionate share of such fund, it may probably be conceded that the guarantee fund was exhausted, and if so there is nothing due to appellant. But we nowhere find the guarantee fund account, or the general account, stated in such direct, explicit and unmixed shape as enables us now to say with certainty that that result must follow. An account is admitted by appellees to be due, and is tendered in paragraph XII. of the answer. It is also referred to in the examiner's report as being present in the witness's hand, but we have not been able to find it printed, unless what is meant is the mass of figures already referred to as presented by the witness Burke. This is much too long, too involved and too full of irrelevant and speculative matters to be satisfactory. The account required is capable of presentation within very small compass, and need contain but few items, though some of the items may involve labor in the examination of books, etc., and a few may be open to conflicting evidence. Appellees should charge themselves first, with the assets, real and personal, received when the works passed into their hands, and secondly, with the moneys received from the works, from time to time during their management, including the balance of profit on manufacturing and other accounts, if any, the cash dividend from the purchase money of the plant, received on the fifty bonds derived from Huston, and any other sums of money received, and not included in the foregoing or other specific items. As to the first item, the price approved by the court, \$450,000, is a conclusive valuation for everything properly included in the sale. The value of the personal property not so included, may be open to question, though the appellees may in the first instance rest on the prima facies made by the sale for \$301,334.63 of what appellant in his bill values at \$250,000.

Syllabus.

On the other side of the account appellees are entitled to credit for all moneys paid out on account of the works (including their own advances from January, 1873, in excess of their contribution to the guarantee fund), interest account, balance of losses on repair, machinery, tool, and other accounts, if any, etc., etc.

To such an account appellant is entitled, and, much as it is to be regretted that this long controversy should be further protracted, we are compelled to afford appellant the opportunity to have such account, if upon consideration of the principles on which it is to be stated, as herein determined, he shall deem it worth while to pursue the case further.

Decree reversed, bill reinstated, and record remitted for an account upon the principles of the opinion filed.

J. FRANK HAYES v. THE PRESS CO., LIMITED.

ERROR TO THE COURT OF COMMON PLEAS NO. 3 OF PHILADELPHIA COUNTY.

Argued January 31, 1889—Decided October 7, 1889.

1. Written or printed words which are injurious to a person in his office, profession, or calling, or which impeach the credit of a merchant or trader, by imputing to him insolvency, or even embarrassment, are libelous.
2. The office of an innuendo is to aver the meaning of the language published, but if the common understanding takes hold of the words, and at once, without difficulty or doubt, applies a libelous meaning to them, an innuendo is unnecessary.
3. The publication by a newspaper, under the heading, "Hotel Proprietors Embarrassed," that a judgment had been entered against the proprietors of a hotel for an amount due on a note payable on demand, was not privileged, but libelous and actionable.
4. In such case, it was error to admit evidence that a notice of the entry of the judgment had been made in other newspapers, and to refuse to charge that the publication complained of was actionable on its face, that it was not privileged, and that malice might be inferred.

Charge of Court below.

Before PAXSON, C. J., STERRETT, GREEN, CLARK, WILLIAMS, MCCOLLUM and MITCHELL, JJ.

No 59 January Term 1888, Sup. Ct. ; court below, No. 885 June Term 1886, C. P. No. 3.

On August 31, 1886, J. Frank Hayes, trading as J. F. Hayes, brought case for libel against the Press Co., Limited, declaring upon a publication made in the *Sunday Press* of August 9, 1886, which was as follows :

“HOTEL PROPRIETORS EMBARRASSED.

“A judgment was entered yesterday by the Third National Bank against J. F. & W. N. Hayes of the St. George's Hotel, on a promissory note dated August 6th, and payable on demand for \$1,500,”

with the innuendo, “thereby then and there meaning that the said J. F. Hayes, the said plaintiff, was in bad circumstances, insolvent, and unworthy of credit.” The defendant company pleaded, not guilty.

At the trial on February 3, 1888, testimony was adduced showing the facts sufficiently appearing in the opinion of the Supreme Court. On cross-examination, the plaintiff was asked :

Q. Was this (the libel) not published in a number of other papers? Objected to.

By the court: I will admit that.¹

A. The fact of the record of the judgment was given in the other papers, or published in other papers.

Q. But it was published in the *Ledger*, *North American*, *Inquirer*, and *Times*,—all except the word “embarrassed.” Is that the only difference? A. The head-line was omitted.

At the close of the testimony, the court, REED, J., charged the jury as follows :

[The defendant in this case, the Press Company, Limited, published a statement about this plaintiff, which it had the privilege, in its functions as a public newspaper, to publish. Beyond that, they had the right to make upon that or any other fact, of a public or somewhat public character, any reasonable and fair comment, and for the exercise of that right they are not to be liable unless the right has been abused. The question of fact, important for you to decide and ascertain

Charge of Court below.

is, whether there was such abuse. That depends upon what conclusion can be drawn from the fact of the entering of this judgment note or the entering up of a judgment upon the note.]³ That is a matter, not of law, but of business practice, and one therefore which falls within your domain rather than within mine. It might well be that the entering of a judgment note against a man, so far as his credit is concerned, would have an effect upon his business credit, so as to cause damage to him; and it might well be that the entering up of a judgment note would not affect a man's credit at all. It might be that the entering up of a judgment would be fatal to the credit of one man, and would not affect the credit of another man. Therefore all these are questions of fact for your decision and not questions upon which I can rule.

[The only thing that caused me to hesitate in my disposition of the case was a doubt, and in expressing it I do not intend to bind you at all, a doubt as to whether there was sufficient evidence before you to satisfy you as to the plaintiff's case.]³ On that point you have the right and it is your privilege to differ from me, and if you think I am wrong in entertaining that doubt, it is not only your privilege but it is your duty to find in a way which perhaps I would not find if I were in your place.

[The first point is, whether the entering up of this judgment, taken alone and as a solitary fact, was so significant that a newspaper in the ordinary course of its daily work might well find that the person against whom such a judgment was entered up was in an embarrassed condition. That point is for you to consider.]⁴ And in considering it, you must consider the second point, which is, what is the meaning of the word "embarrassed," or "embarrassment," in connection with a man's business or his credit? In considering that word you are to take it in its ordinary sense, as men ordinarily intelligent would use such a word. You must ask yourselves, how would I describe, or in what condition would I understand a man to be, who is described as embarrassed? I take it to be, and I am simply expressing my own opinion, not binding you, that a man who needs money for the purposes of his business, and is not able to get it without some difficulty, without difficulty which he feels, that man may be said to be embarrassed in his

Charge of Court below.

pecuniary affairs. A man who needs money and cannot readily get it, by the ordinary means, is a man who in my judgment would be an embarrassed man.

* * * * *

You find that this man, so situated, undertakes to procure a loan of money from a bank. And the question comes up whether the demand of the judgment note on the one side and the giving of the judgment note on the other side, was such a matter as would indicate of itself that the man was in an embarrassed condition. If that was not fairly inferable from all the facts, if it was a reckless assertion on the part of the newspaper, made wantonly, with levity and with carelessness, then the defendant would be liable for the statement. On the other hand, if it was a statement which any fair-minded, intelligent man, with a knowledge of the circumstances and a knowledge of the community, would naturally make under the circumstances, [if it was such an inference as you and I would draw from the facts, then in my opinion they are not liable and it would not be your duty to find a verdict for the plaintiff.]⁵ But the whole matter depends upon questions of fact, which you must find, and which I do not propose to find for you. In expressing any opinion upon the facts, I do it only to enlighten you and not to bind you.

Now that covers the whole case. In the first place you are to consider the situation of the parties, whether the giving of this judgment note was such a fact from which it might be inferred in this particular case that the man was in a condition of embarrassment; and secondly, whether the word "embarrassed" described the condition in which you may find that this man was.

* * * * *

I have been requested by the plaintiff to instruct you as follows:

1. If you believe the plaintiff's innuendo to be true, your verdict must be for the plaintiff.

Answer: I have answered that point already in my general charge. That point unqualifiedly I cannot affirm.⁷

2. The libel is on its face actionable, and no defence whatever has been shown.

Answer: That point I refuse.⁹

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3. It is your duty to infer legal malice in this case.

Answer: That point I refuse.¹⁰

4. This publication was not a privileged communication.

Answer: I have defined in my charge how far it is privileged by telling you that a fair comment was admissible, but that an unfair and reckless comment, or one made in levity and carelessness was not admissible; this would take away the privilege.¹¹

The jury returned a verdict in favor of the defendant. A rule for a new trial having been discharged, judgment was entered on the verdict, when the plaintiff took this writ, assigning as error:

1. The admission of defendant's offer.¹

2-5. The parts of the charge embraced in []^{2 to 5}

7. The answer to plaintiff's point.⁷

9-11. The answers to plaintiff's points.^{9 to 11}

Mr. Richard P. White (with him *Mr. George H. Earle, Jr.*), for the plaintiff in error.

Mr. James H. Shakespeare (with him *Mr James H. Heverin*), for the defendant in error.

OPINION, MR. JUSTICE STERRETT:

The evidence in this case tended to show that after the plaintiff had been engaged for some time in the retail drug business, he purchased the furniture, etc., of the St. George Hotel, Philadelphia, and leased the building itself for a term of five years from September 7, 1885. During the first year the hotel business showed a net profit of about \$8,000, with favorable prospects for the next ensuing year. The house was largely patronized by guests who made it their home during the year, except for a few weeks in the summer.

In August, 1886, plaintiff determined to make some needed repairs, such as painting, papering, etc., involving a greater cash outlay than he was then prepared to meet without a temporary loan. For that purpose he had a note for \$1,500 at four months, indorsed by his brother, discounted by the Third National Bank, with which he kept an account; and, as collateral security therefor, he gave the joint judgment-note of himself and brother, for

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same amount, payable on demand, with the understanding that the latter should be used only in case the discounted note was dishonored. By an oversight of the bank, judgment was prematurely entered on the collateral note, but no execution was issued thereon. The Press Company, Limited, defendant, in its issue of August 9, 1886, published the following notice of the judgment:—

“Hotel Proprietors Embarrassed.”

“A judgment was entered yesterday by the Third National Bank against J. F. and W. N. Hayes, of the St George Hotel, on a promissory note, dated August 6th and payable on demand, for \$1,500.”

This article constitutes the alleged libel, and is declared on with the following innuendo: “thereby then and there meaning that the said J. F. Hayes, the plaintiff, was in bad circumstances, insolvent, and unworthy of credit.” Defendant’s demurrer to the declaration being overruled, the plea of not guilty was entered, and on that issue the case was tried.

In addition to the facts and circumstances above stated, the evidence adduced by plaintiff tended to show that he was not embarrassed, nor in bad circumstances, insolvent, or unworthy of credit, at the time the judgment was entered, nor before; that in round figures his entire liabilities, including drug and hotel business, aggregated about \$16,000, and his assets about thrice that sum; that none of his liabilities were pressing, and a very small proportion of same then due. His object in borrowing the \$1,500 was to provide better accommodations for patrons of the hotel. Plaintiff himself was examined and rigidly cross-examined as to his business affairs, financial condition, etc. His testimony tended to show that the publication was prejudicial to his financial standing, and injurious to his business as proprietor of the hotel. The manner in which it affected both, and the extent of the alleged injury, were stated in detail, and need not be further noticed. The evidence was all for the consideration of the jury in determining questions of fact upon which it was their exclusive province to pass. The hotel books were produced on defendant’s call, but it does not appear that they were examined or put in evidence, nor was there any rebutting testimony offered by defendant.

If there was no error in the trial, the verdict for defendant

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should not be disturbed; but it is alleged the court erred in several particulars, some of which are worthy of notice.

In plaintiff's first and fourth points for charge, the learned judge was requested to instruct the jury as follows: "1. If you believe plaintiff's innuendo to be true, your verdict should be for plaintiff." "4. This publication was not a privileged communication." In his answer to the first, the learned judge said: "I have answered that point already in my general charge. That point I cannot unqualifiedly affirm."

We fail to discover in the general charge any such affirmation of the point, qualified or otherwise, as the publication itself and the undisputed evidence required. It was for the jury to say whether the publication meant what is alleged in the innuendo. If they found it did, the publication was libelous; and, under the uncontradicted evidence, plaintiff was entitled to a verdict. Written or printed words which are injurious to a person in his office, profession, or calling, or which impeach the credit of any merchant or trader, by imputing to him insolvency, or even embarrassment, are libelous. The law carefully guards the credit of merchants and traders. Imputations on their solvency, or suggestions that they are in pecuniary difficulties, etc., are, as a general rule, actionable: *Odgers on Libel*, 19, 29, 80, 81, and authorities there cited.

In its application to a man's financial condition or standing, the word "embarrassed," employed in the head-line of the article complained of, ordinarily means incumbered with debt, beset with urgent claims and demands, unable to meet his pecuniary engagements, etc.—words of substantially the same import as those used in the innuendo. The office of an innuendo is to aver the meaning of the language published, but if the common understanding of mankind takes hold of the published words, and at once, without difficulty or doubt, applies a libelous meaning to them, an innuendo is not needed, and if used may be treated as useless surplusage. Considered in connection with the rest of the article, the word "embarrassed" means substantially what is ascribed to it in the innuendo. That, however, was a question for the jury. The point should have been affirmed.

In his answer to the fourth point, above quoted, the learned judge said: "I have defined in my charge how far it is privi-

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leged, by telling you that a fair comment was admissible, but that an unfair and reckless comment was not admissible. This would take away the privilege." This answer, we think, was misleading, and erroneous. Strictly speaking, the question of privilege was not involved. It was the common right of any one to publish the fact that a judgment for \$1,500 had been entered against the defendants, substantially as shown by the record of the court in which it was entered; but it was neither the right nor the privilege of defendant or any one else to publish in connection therewith the declaration, in the form of a head-line, or otherwise, that the defendants in the judgment were embarrassed. That had a direct tendency to impair their credit and injure their business; and, if the evidence is believed, it did injure plaintiff's credit and business as a hotel-keeper. Such a declaration, whether it be regarded as an inference drawn by the writer from the fact that the judgment was entered, or be called a comment on a judicial proceeding, was an unwarranted assertion of fact, which, if untrue, was manifestly calculated to impair plaintiff's credit and injure his business. It does not follow that one who authorizes a confession of judgment against himself is financially embarrassed. The publication, as a whole, including the head-line, was in no sense privileged. The point should have been affirmed.

For reasons already suggested, those portions of the charge recited in the second, fourth, and fifth specifications were misleading and erroneous.

The testimony, elicited on cross-examination of plaintiff, was irrelevant and improper, and for aught that we know it may have prejudiced plaintiff's case.

The remaining specifications of error are not sustained; but, for reasons suggested in connection with the first, second, fourth, fifth, seventh, and eleventh specifications, the judgment should be reversed.

Judgment reversed, and a venire facias de novo awarded.

INDEX.

For the tables, "CASES CONSIDERED," and "STATUTES CONSIDERED," see the first part of the volume, immediately after the table of "CASES CITED."

ACCORD AND SATISFACTION.

See CONTRACT.

See DEBTOR AND CREDITOR.

ACCOUNTS.

1. Where the administrators of an insolvent estate collected a sum due their decedent on an account open at his death, but paid it directly upon the claim of a creditor of the estate, they are properly surcharged with the amount thereof on the adjudication of their accounts. *Breck-enridge's Appeal*, 81.

2. In such case, however, the accountants are entitled to be subrogated to the rights of the creditor, so paid, in the dividend awarded to the latter's claim against the estate, to an amount not exceeding the amount of the surcharge. *Ibid.*, 81.

3. A claim to the amount of such surcharge, set up by one alleging himself to have been a partner with the decedent in the transaction out of which it arose, was properly disallowed in this case, the evidence being insufficient to establish the alleged partnership. *Ibid.*, 81.

(a) Albright and Miller, as executors, filed a joint account, and upon distribution \$3,000 of the balance was directed to be retained by the executors "and safely invested" for the payment of legacies to that amount payable as the six legatees entitled became of age. This balance was left in the hands of Albright.

(b) Afterwards, a second account was filed, showing a separate liability of the accountants, and after confirmation thereof a joint judgment was entered against them on a transcript from the Orphans' Court, protective of persons interested in the balance shown by this account, who were subsequently paid in full.

(c) Albright becoming insolvent made an assignment; Miller paid the six legatees their legacies, though the fund had never reached his hands, and out of the assigned estate of Albright was awarded a dividend upon the joint judgment referred to, which was presented for his benefit under a claim as for subrogation.

(d) Subsequently, upon the petition of residuary legatees, alleging that there was a balance of the estate undistributed, an auditor was appointed to find the facts and state an account; the auditor reported an

account and decree charging Miller, in favor of the residuary estate, with the dividend received and with the interest on the \$3,000 fund, which report was confirmed.

4. It was error to charge Miller with the dividend received from the assigned estate of Albright; the money was not due to the estate of his decedent, nor awarded to it, but to Miller, and it was not to be treated as assets of said estate. *Miller's Appeal*, 95.

5. The order directing the investment of the \$3,000, imposed no duty upon Miller for the benefit of the residuary estate, but was made for the benefit of the six legatees, then under age; and, as Miller had paid said legatees, he had substantially complied with the order, and it was error in this proceeding to charge him with the interest on the fund. *Ibid.*, 95.

6. Notwithstanding the language ("shall grant") of § 1, act of October 13, 1840, P. L. (1841) 1, an account settled and confirmed by the Orphans' Court can be reviewed only for error of law apparent on the face of the record, or for new matter which has arisen since the decree: *Simpson's App.*, 18 W. N. 175, distinguished. *Priestley's Appeal*, 420.

7. The bill of review must be founded upon some error apparent upon the bill or petition, answer and other pleadings, and decree, which together constitute the record; and the evidence cannot be looked into to support an objection based upon the supposed error of the court in its deductions therefrom. *Ibid.*, 420.

8. But, as a matter of grace, a review may be granted for new proof discovered after the decree, which proof could not possibly be used at the time when the decree was made; yet, where the party complaining has been guilty of laches after notice of the decree, the bill should not be granted. *Ibid.*, 420.

9. The notice by advertisement, directed by law, that an account has been filed and will be presented to the Orphans' Court for confirmation, is effective upon any person or persons entitled to come in and object to the decree. *Ibid.*, 420.

10. And where the petition for a bill of review of an account confirmed, alleges no error of law apparent on the face of the record, but error merely in the amount of commissions allowed to accountant, determinable on the facts, and there is no allegation of after-discovered testimony, the petition should be refused. *Ibid.*, 420.

ACCOUNT, IN EQUITY.

(a) Huston, Clark and Sellers were the owners of nearly all the stock of a manufacturing corporation which in 1873 was practically insolvent. Huston had guaranteed a large part of the corporate indebtedness, and all had made advances to the company, each to an amount over \$100,000:

(b) On May 13, 1873, a written agreement was entered into, wherein it was provided that Huston, in consideration of being indemnified by Clark and Sellers against all his liability for the debts of the company, should assign to Clark and Sellers all his stock and the bonds and a note of the company held by him:

(c) Clark and Sellers agreed to contribute each a like amount with Huston of the bonds and notes of the company, the fund thus created to be called the guarantee fund; the surplus that should remain after payment of the corporate indebtedness, other than that in the guarantee fund, was to be divided among the parties who had contributed to the fund:

(d) Although Huston assigned his stock, bonds and note, as agreed upon, Clark and Sellers did not pay into the guarantee fund the amounts provided by the agreement, but merely credited themselves with advances previously made by them to the amount due by them to the fund, and divided between themselves the bonds assigned by Huston:

(e) Clark and Sellers then took charge of the works of the company and made fresh advances to the amount of \$270,000. Finding, as alleged, that the business was unsuccessful, they permitted the works to be sold under legal process of which Huston had notice, bought the property in, and organized a new corporation.

1. In such case, the advances made by Clark and Sellers prior to the agreement were debts to be paid by the guarantee fund, and their taking credit for such advances did Huston no harm. Clark and Sellers were not the agents of Huston in the subsequent conduct of the business, and they were not bound to include him in the purchase and reorganization. Huston, however, was entitled to an account, so that it could be ascertained if anything were due him from the guarantee fund, after payment of the company's debts. *Huston's Appeal*, 620.

ACTS OF ASSEMBLY.

See after table of "CASES CITED."

ADMINISTRATORS.

See ACCOUNTS.

See EXECUTORS.

1. If an administrator or other trustee invest the trust funds with a private banker, without an order of court but in good faith and under the advice of counsel, he must suffer a loss resulting from the insolvency of the banker, even though the latter was in undoubted credit at the time of the loan. *Baer's Appeal*, 360.

2. A certificate given by a banker that an administrator had "deposited" in his office a sum of money payable to his order or the order of his attorney, "on return of this certificate, twelve months after date, with interest," evidences not merely a deposit but a loan or investment of the money. *Ibid.*, 360.

3. The legal effect of the certificate cannot be modified by parol evidence of a contemporaneous agreement that the money might be withdrawn, but without interest, at any time upon return of the certificate, except upon proof of its omission from the instrument by fraud, accident, or mistake. *Ibid.*, 360.

4. The administrator of an insolvent decedent has the right to collect

and administer the assets of the estate, and neither creditors nor heirs can be heard to object to credits taken in an account for incident and necessary expenses, except on the ground that the credits are excessive. *Mumma's Appeal*, 474.

5. An agreement in good faith by an administrator of an insolvent decedent to allow to an attorney a contingent collection fee of 50 per cent, is not necessarily invalid as against decedent's creditors; they can object to it only if unreasonable and in fraud of their rights. *Ibid.*, 474.

6. Whether, under § 33, act of June 13, 1836, P. L. 548, a poor district which has supported a poor person, can maintain a claim in the Orphans' Court for reimbursement out of choses in action falling due after his death and collected by his administrator, not decided. *Ibid.*, 474.

ADVANCEMENT.

The finding of an auditor, that an heir at law had been advanced by the decedent in the purchase of a farm the deed for which was made directly to the son, being based upon sufficient evidence and approved by the court, the decree confirming the report, etc., will not be reversed. *Lewis's Appeal*, 127.

AFFIDAVIT OF CLAIM.

See STATEMENT OF CLAIM.

AFFIDAVIT OF DEFENCE.

1. While an erroneous or voidable judgment cannot be affected by a writ of error not taken within the statutory period, a void judgment is no judgment at all, and the person affected by it has a right to have it stricken from the record, and to a writ of error to the refusal of such an order. *Clarion etc. R. Co. v. Hamillon*, 1.

2. But if a judgment be erroneously entered for want of an affidavit of defence by a court having jurisdiction of the person and subject matter, it is voidable and not void; and an order refusing to strike it from the record, on a motion made four years after its entry, will not be reversed. *Ibid.*, 1.

(a) The defendant in a desertion case was ordered to give security to the commonwealth to pay a weekly sum to his wife, the complainant, and to be committed to the county jail until the order was complied with.

(b) On the same day of the order, the defendant, with others as his sureties, executed a voluntary bond, acknowledged before the clerk, conditioned that the defendant should appear at the next Court of Quarter Sessions and give the required security.

3. The said bond was a valid obligation, and, in the absence of an averment in the affidavit of defence that the defendant had complied with its condition or of any facts that in law were the equivalent of a surrender, the plaintiff in interest was entitled to summary judgment. *Berkstresser v. Commonwealth*, 15.

4. When in fact the provisions of an act of assembly requiring plans and estimates, etc., were formally complied with by the city engineer, but the estimate made was not such as the defendant considered sufficient, the proper method to state the defence was to set out a copy of the estimate, with an averment of its defects. *Erie City v. Brady*, 169.

5. If, however, the defendant assumed the responsibility of being sworn to matters which were admittedly conclusions of law, but which were stated in unqualified language as positive averments of fact, such a course could not be too strongly reprobated: per Mr. Justice MITCHELL. *Ibid.*, 169.

AGREEMENT.

See CONTRACT.

ALMANAC.

See ARGUMENT TO JURY.

APPEAL.

See SUPREME COURT.

If, upon the trial of an appeal from the judgment of a justice of the peace, the cause is tried upon its merits, without regard to the amount of the plaintiff's claim or of the defendant's set-off, it is too late, when all the testimony is before the jury, for the plaintiff to ask to have the defendant's evidence of set-off withdrawn from the jury, on the ground that its amount exceeds the jurisdiction of the justice. *O'Ferrall v. Moore*, 234.

ARBITRATION AND AWARD.

See SUBMISSION TO ARCHITECT.

ARGUMENT TO JURY.

In an argument to the jury, counsel may refer to the almanac to show that a certain day of the month given in the testimony of a witness, was or was not a certain day of the week, though the almanac was not proved and put in evidence, judicial notice being taken of the fact, without evidence. *Wilson v. VanLeer*, 372.

ASSESSMENTS.

Where the charter of a mutual fire insurance company provided that the managers of the company, when they made an assessment upon policy holders, should "publish the same," and this notice was referred to in other parts of the incorporating act as a "public notice," and as "advertising an assessment," advertisement in a newspaper is the kind of notice required: *Lincoln v. Wright*, 23 Pa. 76, and *Sinking Springs Mut. Ins. Co. v. Hoff*, 2 W. N. 41, distinguished. *Penna. Training School v. Independent Ins. Co.*, 559.

ASSUMPSIT, IMPLIED.

(a) Savanack stole from Hindmarch, the plaintiff, a sum of money, \$400 of which he deposited with Hoffman, the defendant, to be returned to him or upon his order. The defendant did not know of the theft or that the plaintiff claimed the money, until so notified by the plaintiff's attorney, but after the notice he paid the money to the holder of an order from Savanack.

1. In such case, the duty of the defendant to hold the money for the plaintiff, and, upon satisfactory proof of ownership, to pay it over to him, raised an implied promise so to do, and assumpsit for money had and received could be maintained. *Hindmarch v. Hoffman*, 284.

ATTACHMENT FOR FRAUD.

1. A proceeding by attachment under the act of March 17, 1869, P. L. 8, is to be regarded as a personal action, the attachment being intended to secure to the plaintiff a lien in advance, the efficacy of which will depend on the recovery of a final judgment against the defendant. *Miller v. Rohrer*, 385.

2. The prior recovery of a final judgment in another proceeding between the same parties upon the same cause of action, is a bar to the recovery of a judgment in the proceeding by attachment; and this, though the defendant in the attachment filed no bond under § 3 of the act. *Ibid.*, 385.

ATTORNEY-AT-LAW.

An agreement in good faith by an administrator of an insolvent decedent to allow to an attorney a contingent collection fee of 50 per cent, is not necessarily invalid as against decedent's creditors; they can object to it only if unreasonable and in fraud of their rights. *Mumma's Appeal*, 474.

AUDITORS.

The act of May 12, 1887, P. L. 95, providing a fee of \$3 per day and mileage for the auditors "of each county," does not repeal the act of February 5, 1869, P. L. 117, providing a fee of \$3 per day, but without mileage, for the auditors of Fayette county. *Morrison v. Fayette Co.*, 110.

AUDITOR, TO HEAR AND DETERMINE.

1. The finding of an auditor, that an heir at law had been advanced by the decedent in the purchase of a farm the deed for which was made directly to the son, being based upon sufficient evidence and approved by the court, the decree confirming the report, etc., will not be reversed. *Lewis's Appeal*, 127.

2. When a judgment in favor of A., against himself and others, after being assigned by A. to B., is revived in favor of B., the fact that A. occupies the position of legal plaintiff does not prevent such revived

judgment from being good against A. and his creditors. *Sponsler's Appeal*, 409.

3. Creditors cannot attack a judgment before an auditor for distribution, on the ground that it is a fraud upon the debtor. They can make such attack only when the judgment has been fraudulently given by collusion, for the purpose of hindering and delaying them. *Ibid.*, 409.

BAIL-PIECE.

The surety on the recognizance of a defendant convicted of desertion, conditioned that the defendant will pay a weekly sum for the support of his wife, cannot be absolved from liability by an offer to surrender the body of the principal: the obligation of the recognizance is voluntary, and can be discharged only by payment according to its terms. *Miller v. Commonwealth*, 122.

BAILMENT, OR CONDITIONAL SALE?

(a) By the "terms of consignment" attached to an invoice and accepted by the consignee, it was stated that the goods consigned were the property of the consignors, were so to remain until fully paid for, and that the consignors shipped and delivered them upon the express condition that the consignee should remit a sum certain therefor, within a time certain, or return the goods.

1. The transaction, evidenced by such terms, was not a bailment but a sale to the consignee, with an agreement that the title was to remain in the consignors until the price was paid: the arrangement was valid between the parties to it, but the secret lien attempted to be created could not affect the consignee's creditors. *Peek v. Heim*, 500.

2. Whatever the form of the agreement, if the purpose of it is to cover up a sale and preserve a lien in the vendors for the price of the goods, it is void as respects creditors of the vendee, whether the credit is given before or after the delivery of the goods; a consignment for such an object is no better than any other device. *Ibid.*, 500.

BANKS AND BANKING.

1. The cashier of a national bank, holding the paper of a firm of which the cashier is a member, has no power to bind the bank by an agreement that there shall be no liability upon an accommodation note procured by him to be substituted, for a special purpose, for the indebtedness of his firm. *Allen v. First N. Bank*, 51.

2. Nor may the accommodation maker defend upon the ground that his note was procured by the cashier, a member of such debtor firm, to cover up from the bank examiner, by such substitution, the fact that the bank had loaned to the firm in excess of ten per cent of its capital stock. *Ibid.*, 51.

3. It is no defence to the maker of an accommodation note discounted by a bank, that the bank had discounted paper of another person or firm to an amount exceeding the one tenth of its capital:

O'Hare v. Second N. Bank, 77 Pa. 96; Mapes v. Second N. Bank, 80 Pa. 163. *Ibid.*, 51.

BILL OF REVIEW.

1. Notwithstanding the language ("shall grant") of § 1, act of October 13, 1840, P. L. (1841) 1, an account settled and confirmed by the Orphans' Court can be reviewed only for error of law apparent on the face of the record, or for new matter which has arisen since the decree: Simpson's App., 18 W. N. 175, distinguished. *Priestley's Appeal*, 420.

2. The bill of review must be founded upon some error apparent upon the bill or petition, answer and other pleadings, and decree, which together constitute the record; and the evidence cannot be looked into to support an objection based upon the supposed error of the court in its deductions therefrom. *Ibid.*, 420.

3. But, as a matter of grace, a review may be granted for new proof discovered after the decree, which proof could not possibly be used at the time when the decree was made; yet, where the party complaining has been guilty of laches after notice of the decree, the bill should not be granted. *Ibid.*, 420.

4. The notice by advertisement, directed by law, that an account has been filed and will be presented to the Orphans' Court for confirmation, is effective upon any person or persons entitled to come in and object to the decree. *Ibid.*, 420.

5. And where the petition for a bill of review of an account confirmed, alleges no error of law apparent on the face of the record, but error merely in the amount of commissions allowed to accountant, determinable on the facts, and there is no allegation of after-discovered testimony, the petition should be refused. *Ibid.*, 420.

BONDS.

See **BOROUGHES.**

(a) The defendant in a desertion case was ordered to give security to the commonwealth to pay a sum weekly to his wife, the complainant, and to be committed to the county jail until the order was complied with.

(b) On the same day of the order, the defendant, with others as his sureties, executed a voluntary bond, acknowledged before the clerk, conditioned that the defendant should appear at the next Court of Quarter Sessions and give the required security.

1. The said bond was a valid obligation, and, in the absence of an averment in the affidavit of defence that the defendant had complied with its condition, or of any facts that in law were the equivalent of a surrender, the plaintiff in interest was entitled to summary judgment. *Berkstresser v. Commonwealth*, 15.

BOROUGHES.

1. When bonds are issued by a borough to provide for the payment of an existing indebtedness recognized by the corporate authorities as

a legal obligation, but the provisions of § 10, article IX. of the constitution, and of § 2, act of April 20, 1874, P. L. 65, are not complied with, the bonds are issued without authority and are void. *Rainsburg Borough v. Fyan*, 74.

2. If, however, the debt is a lawful one, and the money borrowed is applied to an existing valid indebtedness, thus merely exchanging one creditor for another, the borough is liable for the money and recovery may be had against it on a count upon the simple contract for money loaned. *Ibid.*, 74.

3. Where, in a proceeding by a creditor in the Court of Quarter Sessions under the act of April 22, 1887, P. L. 61, to enforce by mandamus the collection of a special tax sufficient to pay an indebtedness alleged, the petition of citizens and taxpayers of the borough for leave to intervene is refused, the petitioners have no standing to be heard upon the matter on appeal or certiorari in the Supreme Court. *Hower's Appeal*, 134.

4. When, in such a proceeding, the borough files an answer admitting the indebtedness but averring that the treasury is empty and that the revenues which the borough may lawfully raise by taxation in any one year are inadequate to meet the claim, such admission is equivalent to a judgment in favor of the petitioner, and will entitle him to a decree in his favor: per BUCHER, P. J. *Ibid.*, 134.

5. The right of a citizen and taxpayer of a borough, to become a party to any suit or process pending against the borough, etc., under the provisions of the act of March 23, 1877, P. L. 20, exists only where the proceedings in which he applies to intervene are instituted in the Court of Common Pleas: per BUCHER, P. J. *Ibid.*, 134.

BRIDGE.

1. The duty to keep a public highway in repair, devolves, at common law, upon the township upon which rests the duty of opening and making it; but where the expense of carrying the highway across a river or other considerable stream of water is greater than the township should bear, the act of June 13, 1836, P. L. 555, provides that the county may build the bridge and regulates the manner in which it may be done. *Erie Co. v. Commonwealth*, 197.

2. But, excepting counties where the special act of April 13, 1843, P. L. 221, is in force, the law does not make provision for the care of such bridge after its erection by the county; that duty remains upon the township, and the completed bridge, when opened for public travel, becomes a part of the public highway and passes as such under the care of the township officers: *Commonwealth v. Monroe Co.*, 2 W. & S. 495, followed; *Howe v. Crawford Co.*, 47 Pa. 361, disapproved. *Ibid.*, 197.

(a) Road commissioners of a township in Erie county presented a petition setting forth the erection of a county bridge in 1836; that it had been partially destroyed by floods, freshets and ice, and that the county commissioners, although requested so to do, had refused to rebuild and reconstruct it; praying for a mandamus, etc.

3. The act of April 13, 1843, P. L. 221, was not in force in Erie county, and the proceeding, upon the facts of the case, was not under the act of May 5, 1876, P. L. 112, providing that when any county bridge should be destroyed or partially destroyed or swept away by floods, etc., it should be rebuilt by the county, subject to view and inspection as in case of an original erection. *Ibid.*, 197.

4. As it was not alleged that the bridge had been blown down or swept away by floods, or destroyed by casualty, the question presented was over the duty to make repairs under the act of June 13, 1836, P. L. 555, and as that duty rested upon the township and not upon the county, the petition should be dismissed. *Ibid.*, 197.

BURDEN OF PROOF.

See INSURANCE, LIFE.

CASES CONSIDERED.

See after table of "CASES CITED."

CERTIFICATE OF DEPOSIT.

1. If an administrator or other trustee invest the trust funds with a private banker, without an order of court but in good faith and under the advice of counsel, he must suffer a loss resulting from the insolvency of the banker, even though the latter was in undoubted credit at the time of the loan. *Baer's Appeal*, 360.

2. A certificate given by a banker that an administrator had "deposited" in his office a sum of money payable to his order or to the order of his attorney, "on return of this certificate, twelve months after date, with interest," evidences not merely a deposit but a loan or investment of the money. *Ibid.*, 360.

3. The legal effect of the certificate cannot be modified by parol evidence of a contemporaneous agreement that the money might be withdrawn, but without interest, at any time upon return of the certificate, except upon proof of its omission from the instrument by fraud, accident, or mistake. *Ibid.*, 360.

CERTIFICATE OF STOCK.

1. A certificate of stock, issued by a corporation having legal power to issue such certificates, is a continuing affirmation that the holder therein named is the owner of the amount of stock specified, upon which a purchaser or pledgee, dealing with the person named in the certificate or his assignee, has a right to rely as against the corporation. *Kisterbock's Appeal*, 601.

2. If upon the faith of a regularly issued stock certificate, a purchaser or pledgee of stock, which in fact has been fraudulently and collusively issued by officers of the corporation, advances money or parts with anything of value, the corporation is bound by way of estoppel to indemnify

nify him to the extent of his expenditure, against loss in consequence of the falsity of the certificate. *Ibid.*, 601.

3. A holder of such a certificate, who has received it as collateral security for a pre-existing debt from the person in whose name it was fraudulently issued, being uninjured by the falsity of the statements which it contains, has no claim upon it which he can enforce against the corporation. *Ibid.*, 601.

4. Such a certificate is worthless, as a certificate, and gives no rights of its own force. A transfer thereof passes to the transferee no right or claim to shares of stock. The only right which can exist upon it, as against the corporation, is created by the act of parting with a valuable consideration in reliance upon its statements. *Ibid.*, 601.

5. When such a certificate is given in pledge, the thing pledged is not shares of stock, but merely a right to call upon the corporation for indemnity against any loss suffered in consequence of reliance upon its representation that the person therein named is the owner of the shares therein mentioned. *Ibid.*, 601.

6. If a fraudulent certificate is pledged by one who has no claim to indemnity thereon, and the pledgee receives, in settlement of his claim to be indemnified for his advances made on the pledge, genuine shares of stock, surrendering the spurious shares so pledged, such genuine shares do not become a substituted pledge in his hands, but are his absolutely. *Ibid.*, 601.

7. Wherefore, a pledgor of such certificate, who has himself no claim to be indemnified thereon, is not entitled to recover from his pledgee who advanced money to him on the faith of it, any part of what the latter may have received from the corporation upon his claim for indemnity, although such claim may have been paid in genuine shares which afterwards increased in value to an amount exceeding the debt of the pledgor to the pledgee. *Ibid.*, 601.

CHARGE ON LAND.

1. Where land is devised at a valuation or price to be paid by the devisee, the money payable becomes a charge on the land in the hands of the devisee accepting the devise, with a lien which is superior to the lien of judgments subsequently entered against the devisee. *Lancaster Co. N. Bank's Appeal*, 214.

2. Releases executed by trustees of the person entitled to the valuation money, acknowledging payment thereof, though duly recorded prior to the entry of judgments against the devisee, do not relieve the land from the charge, if the evidence show that the money was not in fact paid and that the releases were without consideration. *Ibid.*, 214.

CHARGE TO JURY.

1. Where there is evidence tending to establish the existence of facts hypothetically stated in a point presented for instruction, the proponent has a right to a specific instruction upon the legal effect of those facts, and it is error to refer that legal effect to the jury. *New York etc. R. Co. v. Enches*, 316.

(a) In an action by a passenger to recover damages for personal injuries received while alighting from the defendant company's train, there was evidence that the plaintiff delayed leaving the car when the train stopped and attempted to alight after the train started, though warned by the brakeman against it.

2. It was error in such case to refuse to charge, as requested, that "if the jury believe from the evidence that the plaintiff undertook to get off the train after it began to move, in disregard of the warning of the brakeman not to, she was guilty of contributory negligence and cannot recover." *Ibid.*, 316.

3. Where the question of contributory negligence is fairly raised upon the evidence, it is not enough to charge generally that the plaintiff cannot recover, if guilty of contributory negligence: the court should explain to the jury what facts would constitute such negligence, in view of the testimony, and instruct the jury accordingly. *Ibid.*, 316.

4. If the testimony upon one side of a controverted question of fact is made prominent and conspicuous in the charge to a jury, common fairness requires that equal prominence should be given to opposing testimony having a contrary tendency, and the giving of such undue prominence to one side of the cause is ground for refusal. *Reichenbach v. Ruddach*, 564.

COLLATERAL INHERITANCE TAX.

Where the land of a decedent passes under the intestate laws to his parents for life, and at their death to collateral heirs, the commonwealth is entitled to the collateral inheritance tax upon the appraised value of the land less the amount of the decedent's debts unpaid by his personal estate: the acts of assembly reviewed. *Commonwealth's Appeal*, 435.

CONDITIONAL SALE, OR BAILMENT?

See BAILMENT, OR CONDITIONAL SALE?

CONSIDERATION.

See CONTRACT.

CONSIGNOR AND CONSIGNEE.

See FRAUD UPON CREDITORS.

CONSTITUTIONAL LAW.

See CORPORATE LOANS.

See TAXATION.

CONTRACT.

1. An agreement, without sufficient consideration to accept a smaller sum in satisfaction of a larger one, presently due, cannot be enforced,

and the actual acceptance of such smaller sum is not a good discharge of the debt, even as accord and satisfaction. *Martin v. Frantz*, 389.

2. The fact that, after agreeing with one of two sureties, in consideration of the receipt of one half of the debt, to release him from further liability, the creditor allows the statute of limitations to bar an action on the obligation against the other surety, discloses no consideration by way of detriment to the promisee, supporting the promise to release. *Ibid.*, 389.

3. A right of action for contribution between co-sureties does not arise until one of them has paid more than a due proportion of the debt, and until then the statute of limitations does not begin to run between them; wherefore, such right is unaffected by the fact that the statute may have barred any direct liability of the other surety to the creditor. *Ibid.*, 389.

4. An agreement signed by two persons, that "if the guardian, W., shall buy in certain real estate we, the subscribers, hereby agree and bind ourselves to bear equal shares of the loss (with his two wards), which may be sustained by the property bringing less than the face of the mortgage and its interest;"—is a joint undertaking between the subscribers and W.: as to the guardian, the subscribers are sureties, and each undertakes to make him whole as to one half of the loss. *Forgy v. McWilliams*, 453.

CONTRACT IMPLIED.

(a) Savanack stole from Hindmarch, the plaintiff, a sum of money, \$400 of which he deposited with Hoffman, the defendant, to be returned to him or upon his order. The defendant did not know of the theft or that the plaintiff claimed the money, until so notified by the plaintiff's attorney, but after the notice he paid the money to the holder of an order from Savanack.

1. In such case, the duty of the defendant to hold the money for the plaintiff, and, upon satisfactory proof of ownership, to pay it over to him, raised an implied promise so to do, and assumpsit for money had and received could be maintained. *Hindmarch v. Hoffman*, 284.

CONTRACT TO BUILD.

See SUBMISSION TO ARCHITECT.

(a) In an action on an entire contract, whereby the plaintiff agreed to do the plumbing in the defendant's houses and to furnish the materials, including specified kinds of closets and heaters, the whole to be done in a workmanlike manner, the evidence as to the plaintiff's compliance with the contract being conflicting, it was not error for the court to instruct the jury in the general charge and in answer to points:

1. That if the plaintiff acted honestly, and in good faith substantially performed the contract, that was sufficient, and, if in certain minor particulars the contract was not complied with, the jury might deduct from the plaintiff's damages, the difference between the value of the work as

it was turned over to the defendant, and what it would cost to have it completed in strict conformity with the contract. *Sticker v. Overpeck*, 446.

2. Nor, in such case, was it error to charge, substantially, that, under the plea of set-off the jury might set off against the plaintiff's claim the loss and damage, if any, occasioned to the defendant by the plaintiff's default, but that they could not render a verdict for the defendant for an excess of such loss and damage over the plaintiff's claim, if they should find such excess. *Ibid.*, 446.

CONTRIBUTION.

See SURETIES.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE.

CONVEYANCE.

See DECEDENTS' ESTATES.

CORPORATIONS.

See ACCOUNTS.

See CERTIFICATE OF STOCK.

CORPORATE LOANS.

1. The provisions of § 4, act of June 30, 1885, P. L. 193, requiring the treasurers of corporations to assess a three mills tax upon the nominal value of corporate loans, to deduct the same from the interest paid thereon, and to return it into the state treasury, are not in violation of § 1, article IX. of the constitution of Pennsylvania, providing that all taxes shall be uniform upon the same class of subjects. *Coal Ridge Imp. Co. v. Jennings*, 397.

2. Nor is the said act of June 30, 1885, or said § 4, in violation of article V. or article XIV. of the amendments to the constitution of the United States, or to § 9 of article I. of the constitution of Pennsylvania, providing that no person shall be deprived of life, liberty or property, without due process of law. *Ibid.*, 397.

COUNTY AUDITORS.

See AUDITORS.

COUNTY BRIDGE.

See BRIDGE.

COUNTY COMMISSIONERS.

See REFERENCE.

COURT AND JURY, PROVINCE OF.

See PRACTICE.

1. In an action against several defendants impleaded as partners, one of them denied that he was a partner with the others. There being more than a scintilla of evidence upon the question of fact thus at issue, it was not error to submit it to the jury; and the only remedy for a verdict against the weight of the evidence was by an application to set the verdict aside. *Gates v. Watt*, 20.

2. In this cause, an action of trespass against the sheriff for selling personal property of the plaintiff, a married woman, on an execution against her husband, the trial court properly submitted the facts in evidence to the jury, under correct instructions that the burden was upon the plaintiff to establish affirmatively by clear and satisfactory evidence that the goods claimed to have been unlawfully sold by the defendant, had been bought for her and paid for with money which she had of her separate estate. *Diehl v. Peterson*, 65.

CREDITOR.

See DEBTOR AND CREDITOR.

DAMAGES, MEASURE OF.

See NEGLIGENCE.

DAMAGES STIPULATED, OR PENALTY.

(a) A contract under seal for the sale of an omnibus line provided: "And the party of the first part are not to engage in or use their influence in opposition to the party of the second part, in the passenger, mail or express business in any manner or form. And each party is hereby held and fully bound in the sum of \$300 for the faithful fulfillment of the above contract."

1. The last provision contemplated a penalty rather than stipulated damages, and, in an action for the breach of his covenant by the vendor in re-engaging in the same business, the vendee was entitled to recover the actual damages he had sustained. *Moore v. Coll*, 289.

2. In such action; it was not error to admit testimony that defendant, in violation of his covenant, had carried a certain number of passengers, which at the regular rates amounted to a certain sum, as evidence of the damages to which plaintiff was entitled. *Ibid.*, 289.

DEBTOR AND CREDITOR.

See FRAUD UPON CREDITORS.

See JUDGMENT.

1. An agreement, without sufficient consideration to accept a smaller sum in satisfaction of a larger one, presently due, cannot be enforced,

and the actual acceptance of such smaller sum is not a good discharge of the debt, even as accord and satisfaction. *Martin v. Frantz*, 389.

2. The fact that, after agreeing with one of two sureties, in consideration of the receipt of one half of the debt, to release him from further liability, the creditor allows the statute of limitations to bar an action on the obligation against the other surety, discloses no consideration, by way of detriment to the promisee, supporting the promise to release. *Ibid.*, 389.

3. A right of action for contribution between co-sureties does not arise until one of them has paid more than a due proportion of the debt, and until then the statute of limitations does not begin to run between them; wherefore, such right is unaffected by the fact that the statute may have barred any direct liability of the other surety to the creditor. *Ibid.*, 389.

DECEDENT'S ESTATES.

See ACCOUNTS.

See ADMINISTRATORS.

See ADVANCEMENT.

See COLLATERAL INHERITANCE TAX.

See EXECUTORS.

See ORPHANS' COURTS.

(α) A son and daughter of a deceased person filed a bill in equity against their brother, praying that certain conveyances of property executed to the defendant by their father, a short time before his death, be declared void, on the ground of unsoundness of mind on the part of the father and undue influence on the part of the son.

1. The master found in favor of the defendant on all the issues of fact raised by the pleadings, and on exceptions filed by the plaintiffs his report was confirmed: On appeal to this court, the assignments of error raising no question of law and no error being shown in the master's findings of fact, the decree dismissing the bill at the plaintiffs' costs was affirmed. *Jones's Appeal*, 102.

2. The administrator of an insolvent decedent has the right to collect and administer the assets of the estate, and neither creditors nor heirs can be heard to object to credits taken in an account for incident and necessary expenses, except on the ground that the credits are excessive. *Mumma's Appeal*, 474.

3. An agreement in good faith by an administrator of an insolvent decedent to allow to an attorney a contingent collection fee of 50 per cent, is not necessarily invalid as against decedent's creditors; they can object to it only if unreasonable and in fraud of their rights. *Ibid.*, 474.

4. Whether, under § 33, act of June 13, 1836, P. L. 548, a poor district which has supported a poor person, can maintain a claim in the Orphans' Court for reimbursement out of choses in action falling due after his death and collected by his administrator, not decided. *Ibid.*, 474.

5. An award by the Orphans' Court to a creditor of a decedent, of the amount of his claim out of funds adjudged to be in the hands of an executor, is not the equivalent in law of actual payment of the claim. *Pomeroy's Appeal*, 492.

6. If such creditor, by reason of the executor's insolvency, fail to receive payment of the sum awarded him, he is entitled to come in upon a second fund raised in the same estate for a pro rata share thereof. *Ibid.*, 492.

7. An order, pending exceptions to an auditor's report, directing payment of an award to a creditor unaffected by them, is a matter within the discretion of the court, and the creditor's omission to apply for such order is not laches. *Ibid.*, 492.

DESERTION OF WIFE, ETC.

(a) The defendant in a desertion case was ordered to give security to the commonwealth to pay a sum weekly to his wife, the complainant, and to be committed to the county jail until the order was complied with.

(b) On the same day of the order, the defendant, with others as his sureties, executed a voluntary bond, acknowledged before the clerk, conditioned that the defendant should appear at the next Court of Quarter Sessions and give the required security.

1. The said bond was a valid obligation, and, in the absence of an averment in the affidavit of defence that the defendant had complied with its condition, or of any facts that in law were the equivalent of a surrender, the plaintiff in interest was entitled to summary judgment. *Berkstresser v. Commonwealth*, 15.

2. The surety on the recognizance of a defendant convicted of desertion, conditioned that the defendant will pay a weekly sum for the support of his wife, cannot be absolved from liability by an offer to surrender the body of the principal: the obligation of the recognizance is voluntary and can be discharged only by payment according to its terms. *Miller v. Commonwealth*, 122.

DEVISE.

See WILL.

1. Where land is devised at a valuation or price to be paid by the devisee, the money payable becomes a charge on the land in the hands of the devisee accepting the devise, with a lien which is superior to the lien of judgments subsequently entered against the devisee. *Lancaster Co. N. Bank's Appeal*, 214.

2. Releases executed by trustees of the person entitled to the valuation money, acknowledging payment thereof, though duly recorded prior to the entry of judgments against the devisee, do not relieve the land from the charge, if the evidence show that the money was not in fact paid and that the releases were without consideration. *Ibid.*, 214.

DISTRIBUTION.

See ACCOUNTS.

See DECEDENTS' ESTATES.

See LIFE-ESTATE.

EJECTMENT.

1. When a judgment in ejectment has been entered in favor of the plaintiff, to be released on payment of a sum certain on or before a specified day, time is of the essence of the contract, and if the money be not paid on or before the day, the judgment becomes absolute and indefeasible. *Beatty v. Hamilton*, 71.

2. Counsel for the plaintiff has no power, in such case, to extend the time of payment, without express authority to do so from the plaintiff; nor has the court authority to interfere, after the judgment has become absolute by the defendant's neglect to pay within the specified time. *Ibid.*, 71.

(a) In an action of ejectment, the defendants relied upon a deed from the father of plaintiffs and defendants, dated July 25, 1882. The plaintiffs showed that an inquest of lunacy on February 19, 1884, found that the grantor was insane, and had been since April 19, 1882.

(b) The defendants made offers to prove declarations by the grantor made within fifteen months of the date when the insanity, as found, began, and within eighteen months of the date of the disputed deed, that he intended to execute "this conveyance" or "a deed" to the defendants.

3. In regard to the competency of evidence as to the insanity of the maker, there is no difference in principle whether the controversy be concerning the validity of a deed or of a will, and in this case, the declarations were not too remote to be admissible. *Rice v. Rice*, 181.

4. Nor was the variance between the declarations offered and what the grantor subsequently in fact did, of any weight; for, if the declared intention had been to make a gift, the variance was immaterial, and it was proper for the jury to be informed what the grantor's intentions had been when his sanity was unquestioned. *Ibid.*, 181.

5. A paper in the form of a will, devising real estate expressly in consideration of and as compensation for specific services to be rendered by the devisee, may operate as a memorandum of a contract for the sale of land sufficient to comply with the statute of frauds, and as such be admissible in evidence during the lifetime of the testator. *Smith v. Tuit*, 341.

6. Such paper, without evidence of anything done under it by the devisee, cannot be treated as anything more than a will, revocable at the mere pleasure of the testator; but when the testator has put the devisee in possession of the land devised, and the latter has fully complied with his part of the agreement, the devise loses its revocability and must be treated as an executed contract. *Ibid.*, 341.

7. If such instrument contain a provision that the devisee shall have

possession of the land devised during the lifetime of the testator, and in pursuance of this provision the devisee obtain possession thereof and faithfully perform the specified conditions, he cannot be ousted from the land even by the testator, but has vested in him a right of possession sufficient to defeat ejectment brought by the testator or his grantee. *Ibid.*, 341.

EQUITY.

See ACCOUNT, IN EQUITY.

See PARTNERSHIP.

EQUITY, PRACTICE.

See OIL- AND GAS-LEASE.

(a) A son and daughter of a deceased person filed a bill in equity against their brother, praying that certain conveyances of property executed to the defendant by their father, a short time before his death, be declared void, on the ground of unsoundness of mind on the part of the father and undue influence on the part of the son.

1. The master found in favor of the defendant on all the issues of fact raised by the pleadings, and on exceptions filed by the plaintiffs his report was confirmed: On appeal to this court, the assignments of error raising no question of law and no error being shown in the master's findings of fact, the decree dismissing the bill at the plaintiffs' costs was affirmed. *Jones's Appeal*, 102.

(a) A mortgage, by a clerical error, described certain lots conveyed as in block 17 instead of in block 7. The description of the lots, both as to boundaries and improvements could apply only to lots in block 7. After the mortgagor died, a decree re-forming the mortgage was obtained by bill in equity, all the heirs being made parties.

2. In such case, whether notice of the proceeding in equity to an heir as an heir did or did not bind him as a judgment creditor was immaterial, for the mortgage, as to an heir familiar with the property for years and whom the misdescription could not deceive, was a valid conveyance without re-formation. *Cake v. Cake*, 400.

ERROR AND APPEAL.

See SUPREME COURT.

ESTATE-TAIL.

1. A devise in the following form: "I give, devise and bequeath to my son T. my farm and if he should die leaving no lawful heirs, the whole to descend to his brothers and sisters, share and share alike, or to their legal representatives," read in connection with other portions of the will, gave an estate-tail to the devisee. *Cochran v. Cochran*, 486.

2. Such an estate, devised by a will becoming operative prior to the

act of April 27, 1855, P. L. 368, may be barred by deed duly executed, acknowledged and recorded, in accordance with the provisions of the act of January 16, 1799, 3 Sm. L. 338. *Ibid.*, 486.

ESTOPPEL.

See CERTIFICATE OF STOCK.

EXECUTION.

See FIERI FACIAS.

EXECUTION OF WILL.

See HANDWRITING.

EXECUTORS.

See ACCOUNTS.

See ADMINISTRATORS.

EVIDENCE.

See ISSUE DEVISAVIT VEL NON.

See LIBEL.

See WITNESS.

(a) In an action of ejectment, the defendants relied upon a deed from the father of plaintiffs and defendants, dated July 25, 1882. The plaintiffs showed that an inquest of lunacy on February 19, 1884, found that the grantor was insane, and had been since April 19, 1882.

(b) The defendants made offers to prove declarations by the grantor made within fifteen months of the date when the insanity, as found, began, and within eighteen months of the date of the disputed deed, that he intended to execute "this conveyance" or "a deed" to the defendants.

1. In regard to the competency of evidence as to the insanity of the maker, there is no difference in principle whether the controversy be concerning the validity of a deed or of a will, and in this case, the declarations were not too remote to be admissible. *Rice v. Rice*, 181.

2. Nor was the variance between the declarations offered and what the grantor subsequently in fact did, of any weight; for, if the declared intention had been to make a gift, the variance was immaterial, and it was proper for the jury to be informed what the grantor's intentions had been when his sanity was unquestioned. *Ibid.*, 181.

3. In an argument to the jury, counsel may refer to the almanac to show that a certain day of the month given in the testimony of a witness, was or was not a certain day of the week, though the almanac was not proved and put in evidence, judicial notice being taken of the fact, without evidence. *Wilson v. VanLeer*, 372.

4. In a feigned issue to try the title to goods levied upon as belonging to a husband, but claimed by his wife, the declarations of the husband adverse to the claim of the wife, made in her absence and after the levy, are not admissible upon any theory. *Martin v. Rutt*, 381.

5. As declarations, they are secondary, not being those of the plaintiff herself; as declarations of an agent they are incompetent, because not part of the *res gestæ*; and finally, they are incompetent because they are the declarations of a husband against his wife. *Ibid.*, 381.

6. In an action against a railroad company to recover damages for personal injuries, it appeared that the injuries were inflicted upon the track and by the engine and cars of another company. There was no direct testimony that the road of such company was then owned or leased by the defendant; yet, there being evidence of facts and circumstances sufficiently tending to show that the defendant then operated it, it was not error to submit the question of defendant's responsibility to the jury. *Penna. R. Co. v. Sellers*, 406.

FAYETTE COUNTY.

The act of May 12, 1887, P. L. 95, providing a fee of \$3 per day and mileage for the auditors "of each county," does not repeal the act of February 5, 1869, P. L. 117, providing a fee of \$3 per day, but without mileage, for the auditors of Fayette county. *Morrison v. Fayette Co.*, 110.

FEE-TAIL.

See ESTATE-TAIL.

FIERI FACIAS.

1. An order setting aside an execution is in the nature of a final judgment, and a writ of error will lie thereto. *Feagley v. Norbeck*, 238.

2. Where, at the time a bond with warrant of attorney to enter judgment is executed, the obligee agrees in writing not to issue execution except on a specified contingency, it is not error to set aside an execution issued in violation of the agreement. *Ibid.*, 238.

3. The record showed that depositions had been filed to be read at the hearing of the rule to set aside the execution, but they were not furnished to the Supreme Court: In such case the finding of the court below, that the writ was issued in violation of the agreement, will be taken as correct. *Ibid.*, 238.

FIRE INSURANCE.

See INSURANCE, FIRE.

FORMER RECOVERY.

See RES JUDICATA.

FRAUD UPON CREDITORS.

See ATTACHMENT FOR FRAUD.

See PARTNERSHIP.

1. Where, in a sheriff's interpleader, it was found that the claimant of the property, grain, stock, implements, which had been purchased at execution sales, left it with the execution defendant, who was made a tenant upon a farm rented by the claimant under an arrangement in good faith that the tenant should work the farm, keep up the property, and after taking out a support for himself and family turn over the surplus to the claimant, the transaction was not a fraud in law or in fact upon the tenant's creditors. *Rohland v. Rooke*, 189.

2. When a judgment in favor of A., against himself and others, after being assigned by A. to B., is revived in favor of B., the fact that A. occupies the position of legal plaintiff does not prevent such revived judgment from being good against A. and his creditors. *Sponser's Appeal*, 410.

3. Creditors cannot attack a judgment before an auditor for distribution, on the ground that it is a fraud upon the debtor. They can make such attack only when the judgment has been fraudulently given by collusion, for the purpose of hindering and delaying them. *Ibid.*, 410.

(a) By the "terms of consignment" attached to an invoice and accepted by the consignee, it was stated that the goods consigned were the property of the consignors, were so to remain until fully paid for, and that the consignors shipped and delivered them upon the express condition that the consignee should remit a sum certain therefor, within a time certain, or return the goods.

4. The transaction, evidenced by such terms, was not a bailment but a sale to the consignee, with an agreement that the title was to remain in the consignors until the price was paid: the arrangement was valid between the parties to it, but the secret lien attempted to be created could not affect the consignee's creditors. *Peek v. Heim*, 500.

5. Whatever the form of the agreement, if the purpose of it is to cover up a sale and preserve a lien in the vendors for the price of the goods, it is void as respects creditors of the vendee, whether the credit is given before or after the delivery of the goods; a consignment for such an object is no better than any other device. *Ibid.*, 500.

GIFT INTER VIVOS.

(a) In 1864, a widower executed and delivered a note under seal for \$5,000, payable to a trustee for his children named therein, five years after date, with interest: on the same day he was married a second time. In 1877, he died, leaving to survive him his widow, the children by his first marriage, and one child by his second, with an estate of \$100,000, of which the personalty was exhausted in the payment of debts, administration expenses and money legacies.

1. In such case, the transaction was a duly executed gift inter vivos, and, considered in connection with the amount of the estate, there being no evidence of fraudulent intent, the note was not in fraud of the rights of the second wife, and was properly payable out of the proceeds of realty, sold either by the decedent in his lifetime, or by his executors within five years after his death under a power in his will. *Ross's Appeal*, 4.

GUARDIAN AND WARD.

(a) A testator by his will, after bequeathing a legacy of \$1,000 to his son H., divided the residue of his estate equally between his two sons H. and L., and then provided: "I desire that my son L. receive \$1,000 as soon as he arrives at the age of 21 years, and that the remainder of his share be invested in a farm, he, the said L., having full control of the farm, and receiving all proceeds therefrom, but not having power to sell," with remainder to his children.

1. In such case, the testator's intention was, that upon attaining his majority L. should have \$1,000 paid to him absolutely, and it was error for the court below to deduct therefrom advances made for L.'s maintenance, by his guardian, from time to time, under decrees of the Orphans' Court. *Lightner v. Lightner*, 468.

2. The remaining gift to L., under the will, was a present and absolute interest for life in the fund, vested upon the death of the testator. The income followed the title and was L.'s absolute property, applicable during minority to his maintenance, under direction of the court, but the accumulations payable to him at majority, in addition to the \$1,000. *Ibid.*, 468.

HANDWRITING.

(a) A witness, called to prove the signature of an alleged testator to a testamentary paper, testified that he had seen the testator write his name twice to letters thirty-two years, and once as an indorsement upon a check twenty-three years, prior to the time when he was called to testify.

1. There being no subsequent evidence raising any question as to the truth of the facts so stated, the competency of the witness to express his opinion as to the signature was a matter clearly for the court, and it was not error to refuse to allow the jury to review the ruling of the court thereon. *Wilson v. VanLeer*, 372.

2. The ruling that the witness was competent to testify concerning the handwriting, was within the line of the authorities, but, considering the untrustworthiness of opinions on handwriting in general, such evidence ought to be guarded with caution. *Ibid.*, 372.

3. The limit within which the witness must have seen the writing done, must depend upon his intelligence, his habits of observation and the apparent strength and confidence of his memory, which must be passed upon in the first instance by the trial judge. *Ibid.*, 372.

HIGHWAYS.

See BRIDGES.

1. Township officers are bound to anticipate and provide for the ordinary needs of travel conducted in the ordinary manner, and to remove obstructions and defects which would naturally or probably cause injury to the traveler along the highway. *Jackson Tp. v. Wagner*, 184.

2. But where the highway is an ordinary country road through an open cultivated region, with no unusual dangers or exposures, such of-

ficers are not bound to anticipate the dangers to which a broken wagon or a frightened horse may expose the driver. *Ibid.*, 184.

3. Where the plaintiff's horse, driven upon a highway, was frightened at an object for the presence of which in the highway the township was not responsible, and, turning suddenly, broke off a wheel, and dragged and overturned the carriage upon a stone heap at the roadside at a point where the roadway was not unsafe for ordinary travel, the township is not liable for the resulting injuries. *Ibid.*, 184.

HUSBAND AND WIFE.

See MARRIED WOMAN.

(a) In 1864, a widower executed and delivered a note under seal for \$5,000, payable to a trustee for his children named therein, five years after date, with interest: on the same day he was married a second time. In 1877, he died, leaving to survive him his widow, the children by his first marriage, and one child by his second, with an estate of \$100,000, of which the personalty was exhausted in the payment of debts, administration expenses and money legacies.

1. In such case, the transaction was a duly executed gift inter vivos, and, considered in connection with the amount of the estate, there being no evidence of fraudulent intent, the note was not in fraud of the rights of the second wife, and was properly payable out of the proceeds of realty, sold either by the decedent in his lifetime, or by his executors within five years after his death under a power in his will. *Ross's Appeal*, 4.

2. In this cause, an action of trespass against the sheriff for selling personal property of the plaintiff, a married woman, on an execution against her husband, the trial court properly submitted the facts in evidence to the jury, under correct instructions that the burden was upon the plaintiff to establish affirmatively by clear and satisfactory evidence that the goods claimed to have been unlawfully sold by the defendant, had been bought for her and paid for with money which she had of her separate estate. *Diehl v. Peterson*, 65.

3. In a feigned issue to try the title to goods levied upon as belonging to a husband, but claimed by his wife, the declarations of the husband adverse to the claim of the wife, made in her absence and after the levy, are not admissible upon any theory. *Martin v. Rutt*, 381.

4. As declarations, they are secondary, not being those of the plaintiff herself; as declarations of an agent they are incompetent, because not part of the *res gestæ*; and finally they are incompetent because they are the declarations of a husband against his wife. *Ibid.*, 381.

IMPROVEMENTS.

A life-tenant is not to be allowed out of the proceeds of a sheriff's sale of the entire estate in lands, the amount expended by him for permanent improvements, when they were trifling and unimportant in character and there was no evidence adduced to show that they were made with the consent of the remaindermen. *Dalesman's Appeal*, 348.

INFANT.

See GUARDIAN AND WARD.

INNUENDO.

See LIBEL.

INSANITY.

See EVIDENCE.

INSURANCE, FIRE.

1. Where a policy of fire insurance provided that "the aggregate amount insured in this and all other companies on the above mentioned property, shall not exceed two thirds of the cash value," and the plaintiff's evidence in an action thereon showed that the assured subsequently took out a policy in another company on the same property, and that the amount of insurance in the two companies exceeded two thirds of the cash value of said property, it was not error to enter a compulsory nonsuit. *Bahner v. Insurance Co.*, 464.

2. Where the charter of a mutual fire insurance company provided that the managers of the company, when they made an assessment upon policy holders, should "publish the same," and this notice was referred to in other parts of the incorporating act as a "public notice," and as "advertising an assessment," advertisement in a newspaper is the kind of notice required: *Lincoln v. Wright*, 23 Pa. 76, and *Sinking Springs Mut. Ins. Co. v. Hoff*, 2 W. N. 41, distinguished. *Penna. Training School v. Independent Ins. Co.*, 559.

INSURANCE, LIFE.

In an action by the administrator of a person whose life was insured, against one to whom the assured had assigned the policy two days after it was issued, and who had received payment thereof after the death of the assured, the burden is upon the plaintiff to prove, not only that the assignee was not a relative of the assured but also that he was not his creditor. *Lenig v. Eisenhart*, 59.

INTERPLEADER.

See SHERIFF'S INTERPLEADER.

INTEREST.

(a) A borrower received \$5,000 giving a bond upon which judgment was entered, agreeing at the time to pay a bonus of \$300 for the loan. On December 19th, he gave the lender his note for \$300, the bonus agreed upon, payable in three instalments.

(b) After payment of one instalment on the note, the borrower executed to the lender a new bond for \$5,000 secured by a mortgage,

whereupon the judgment referred to was satisfied; subsequently, he paid the remaining instalments of the \$300 note.

1. In such case, the bonus represented by the note of December 19th was usurious, and in an action by an assignee of the bond and mortgage, the debtor was entitled to credit upon the mortgage debt for all the payments made upon that note: *Colvin v. Blymyer*, 121 Pa. 582, explained. *Blymyer v. Colvin*, 114.

ISSUE DEVISAVIT VEL NON.

See HANDWRITING.

1. Where, upon the hearing of a citation to show cause why an issue devisavit vel non should not be ordered on the ground of mental incapacity, the testimony submitted disclosed that the only allegation against the mental soundness of the testator was a habit of periodical but excessive drinking; that not even ordinary intoxication at the time the testamentary paper was executed was established; and that the instrument was dictated by the testator and well understood by him at the time and after, there was no sufficient evidence upon which a verdict adverse to the instrument in question should be sustained, and it was not error to refuse the issue. *Harmony Lodge's Appeal*, 269.

(a) In an issue devisavit vel non, raising the questions of testamentary capacity and undue influence, after testimony sustaining the alleged will, there was much testimony tending to establish that though the deceased in early life was of excellent mind, culture and deportment, yet in his later years he was addicted to drunkenness, profligacy and sexual excesses:

(b) That within three months before the alleged will was executed, his mental powers had become so impaired by his profligate habits that he was then in such a condition of chronic alcoholic insanity, with dementia, that, in the judgment of medical witnesses and experts, it was almost impossible there should be a recovery with mental capacity:

(c) That for several years, and up to the time when she became his wife, the deceased had been living with the sole beneficiary under his will, as his mistress; that the marriage was suggested to him by another and was performed in the house of the beneficiary, where the will was executed on the second day thereafter, and where the testator died on the third day.

2. The record of a hospital for the insane, indicating that the testator's father, thirty-eight years before, was admitted to the hospital because of intemperance, continued for six months and resulting in melancholia, was inadmissible, when there was no proof or offer of proof that the species of melancholia with which the father was affected was transmissible by inheritance. *Reichenbach v. Rudduch*, 564.

3. It was error, under the testimony in the case, to charge the jury in affirmance of a point by the proponent, that there was no sufficient evidence of general insanity of the deceased, and that therefore the burden of proof was upon the contestants to show the existence of testamentary capacity at the very moment of the execution of the will. *Ibid.*, 564.

4. The testimony upon the subject of the previous condition of the testator should have been submitted to the jury, with instructions that if it failed to satisfy them that there was a condition of general insanity at any time before the will was made, then the burden of proof of testamentary incapacity at the time of execution was on the contestants. *Ibid.*, 564.

5. The language of a point to the effect that if the jury found from all the evidence in the case that there was such imbecility of intellect as "rendered the testator incapable of appreciating, knowing, remembering, and calling to mind the value and extent of his property, at the time of making and executing said will," was entirely too broad. *Ibid.*, 564.

6. A disposing mind and memory is one in which the testator is shown to have had, at the making and execution of a last will a full and intelligent consciousness of the nature and effect of the act he was engaged in; a full knowledge of the property he possessed, and an understanding of the disposition he wished to make of it by the will, and of the persons and objects he desired to participate in his bounty. *Ibid.*, 564.

7. It was error to refuse instruction requested, that the jury might take into consideration "the state and condition of mind of the testator," at the time of making and executing the will, "the condition and relative situation of the testator and the proponent, the situation, surroundings, and condition of the testator himself, the nature and extent of his property, all the circumstances under which the will was made and the provisions of the will itself." *Ibid.*, 564.

8. While in the present case the fact that a marriage had taken place prior to the will, relieved the proponent from the rule of *Dean v. Negley*, 41 Pa. 312, as to undue influence of a mistress, it did not relieve the testamentary act from the imputation of a continuance and a present exertion of an undue influence, if the jury in view of all the facts inclined to such a belief. *Ibid.*, 564.

9. It is not true, in law, that one who has merely "given indications of mental unsoundness" is not at liberty to do what he likes with his own, or that in such case "every sign of partiality or injustice must be viewed with strong suspicion;" indications of insanity do not constitute testamentary incapacity, and *Dr. Ray's report in Pidcock v. Potter*, 68 Pa. 353, is not the opinion of the court. *Ibid.*, 564.

10. There was no relevancy or legal propriety in suggesting by a point a limit of time within which a radical change from a condition of testamentary incapacity might not take place, when there was abundance of testimony as to what the actual condition of the testator was at the end of that period, and ample opportunity to deliver direct testimony on the subject. *Ibid.*, 564.

11. If the testimony upon one side of a controverted question of fact is made prominent and conspicuous in the charge to a jury, common fairness requires that equal prominence should be given to opposing testimony having a contrary tendency, and the giving of such undue prominence to one side of the cause is ground for reversal. *Ibid.*, 564.

12. Averments of testamentary incapacity or undue influence need not be established by positive evidence as distinguished from circumstantial; it was error therefore, to charge in this case that the presumption, where a will was duly executed by a person of full age, that he was competent and not unduly influenced, must be overcome, not by doubtful testimony, but by positive evidence. *Ibid.*, 564.

JOINT STOCK COMPANIES.

See LIMITED PARTNERSHIP.

JOINT UNDERTAKING.

See CONTRACT.

JUDGMENT.

1. While an erroneous or voidable judgment cannot be affected by a writ of error not taken within the statutory period, a void judgment is no judgment at all, and the person affected by it has a right to have it stricken from the record, and to a writ of error to the refusal of such an order. *Clarion etc. R. Co. v. Hamillon*, 1.

2. But if a judgment be erroneously entered for want of an affidavit of defence by a court having jurisdiction of the person and subject matter, it is voidable and not void; and an order refusing to strike it from the record, on a motion made four years after its entry, will not be reversed. *Ibid.*, 1.

(a) Pending a scire facias to revive a judgment, at issue under the plea of nul tiel record, the defendant, alleging insufficiency of the power under which the judgment had been confessed, and also payment, presented a petition for a rule to strike off the judgment and to open the same to let in a defence.

3. The judgment having been entered thirteen years before the scire facias issued, and sixteen years before the petition was presented, and no reason assigned for the delay, it was not error to discharge the rule granted and to permit the defence of payment to be made upon the trial of the scire facias. *Richards' Appeal*, 63.

4. When a judgment in ejectment has been entered in favor of the plaintiff, to be released on payment of a sum certain on or before a specified day, time is of the essence of the contract, and if the money be not paid on or before the day, the judgment becomes absolute and indefeasible. *Beatty v. Hamillon*, 71.

5. Counsel for the plaintiff has no power, in such case, to extend the time of payment, without express authority to do so from the plaintiff; nor has the court authority to interfere, after the judgment has become absolute by the defendant's neglect to pay within the specified time. *Ibid.*, 71.

6. Where the plaintiff in a judgment, without fraud or deceit, and through a voluntary payment made by the sheriff out of the proceeds of a judicial sale, receives the amount appearing to be due by the record

of the judgment, which is more than the sum actually remaining due thereon, but not more than enough to extinguish the indebtedness of the defendant to him, he has a right to apply the excess to indebtedness other than the judgment. *First N. Bank v. Fair*, 324.

7. A person who, after the entry of a judgment and before a sheriff's sale of real estate thereunder, purchased the land from the defendant in the judgment, has no higher rights against the judgment plaintiff than the latter: if the defendant may not recover from the plaintiff money collected by means of an execution and sheriff's sale of the land upon which the judgment was a lien, neither can such purchaser. *Ibid.*, 324.

8. When a judgment in favor of A., against himself and others, after being assigned by A. to B., is revived in favor of B., the fact that A. occupies the position of legal plaintiff does not prevent such revived judgment from being good against A. and his creditors. *Sponsler's Appeal*, 410.

9. Creditors cannot attack a judgment before an auditor for distribution, on the ground that it is a fraud upon the debtor. They can make such attack only when the judgment has been fraudulently given by collusion, for the purpose of hindering and delaying them. *Ibid.*, 410.

JUDGMENT BOND.

1. Where, at the time a bond with warrant of attorney to enter judgment is executed, the obligee agrees in writing not to issue execution except on a specified contingency, it is not error to set aside an execution issued in violation of the agreement. *Feagley v. Norbeck*, 238.

2. The record showed that depositions had been filed to be read at the hearing of the rule to set aside the execution, but they were not furnished to the Supreme Court: In such case the finding of the court below, that the writ was issued in violation of the agreement, will be taken as correct. *Ibid.*, 238.

JUDICIAL SALE.

See SHERIFF'S SALE.

JURISDICTION.

If, upon the trial of an appeal from the judgment of a justice of the peace, the cause is tried upon its merits, without regard to the amount of the plaintiff's claim or of the defendant's set-off, it is too late, when all the testimony is before the jury, for the plaintiff to ask to have the defendant's evidence of set-off withdrawn from the jury, on the ground that its amount exceeds the jurisdiction of the justice. *O'Ferrall v. Moore*, 234.

LIBEL.

1. Written or printed words which are injurious to a person in his office, profession, or calling, or which impeach the credit of a merchant or trader, by imputing to him insolvency, or even embarrassment, are libelous. *Hayes v. Press Co., Lim.*, 642.

2. The office of an innuendo is to aver the meaning of the language published, but if the common understanding takes hold of the words, and at once, without difficulty or doubt, applies a libelous meaning to them, an innuendo is unnecessary. *Ibid.*, 642.

3. The publication by a newspaper, under the heading "Hotel Proprietors Embarrassed," that a judgment had been entered against the proprietors of a hotel for an amount due on a note payable on demand, was not privileged, but libelous and actionable. *Ibid.*, 642.

4. In such case, it was error to admit evidence that a notice of the entry of the judgment had been made in other newspapers, and to refuse to charge that the publication complained of was actionable on its face, that it was not privileged, and that malice might be inferred. *Ibid.*, 642.

LICENSE TO SELL LIQUORS.

1. Upon a writ of certiorari to the order of the Court of Quarter Sessions revoking a license to sell liquors, under § 7, act of May 13, 1887, P. L. 110, neither the testimony nor the opinion of the court below form any part of the record which may be considered. *In re Carlson's License*, 330.

2. The agreement of the counsel that the testimony may be omitted from the paper book, and that the finding of facts as contained in the opinion of the court below should be considered in lieu thereof by the Supreme Court, is nugatory. *Ibid.*, 330.

3. In such proceedings, the provision of the section is mandatory, and it will be presumed that the court below had sufficient evidence before it to show that the licensee had violated some law of the commonwealth in regard to the sale of liquor. *Ibid.*, 330.

4. On a proceeding to revoke a license to sell liquors under said section, on the ground that the licensee sold liquors to minors, it is no sufficient excuse or justification that he sold to them in good faith, informed and believing that they were of full age. *Ibid.*, 330.

5. The granting of wholesale licenses being a matter specially committed to the Courts of Quarter Sessions by the act of May 24, 1887, P. L. 194, upon a writ of certiorari the Supreme Court may review the proceedings of such courts therein, so far as to see that they have kept within the limits of the powers conferred, and have exercised them in conformity with law. *Pollard's Petition*, 507.

6. The provision of the act of May 24, 1887, P. L. 194, that wholesale licenses to dealers, brewers, distillers, bottlers, etc., "shall be granted only by the Court of Quarter Sessions of the proper county in such manner as is provided by existing laws," does not confer upon such courts the discretionary powers conferred by the act of May 13, 1887, P. L. 108, relating to licenses to sell liquors by retail. *Ibid.*, 507.

7. The retail license act of May 13, 1887, being an act to restrain and regulate the sale of liquors, and the wholesale license act of May 24, 1887, being an act providing for revenue, with no reference in the latter act to the provisions of the former, the "existing laws" referred to in the latter act are the existing laws in force in the proper county relating to the granting of wholesale licenses. *Ibid.*, 507.

8. The existing law relating to the granting of wholesale licenses in Allegheny county is the act of April 3, 1872, P. L. 843, which, in respect of the qualifications of applicants, is unrepealed by the act of May 24, 1887, P. L. 194, and imposes upon applicants no qualifications save that they must be citizens of the United States, of temperate habits, and of good moral character. *Ibid.*, 507.

9. Wherefore, a petitioner for a wholesale license as a dealer, brewer, distiller, or bottler, etc., in said county, who has presented his application in due form and has complied with the requisites of the law, has prima facie a right to such license, and, in the absence of anything upon the record to impeach such right, the refusal of the court to grant it will be reversed. *Ibid.*, 507.

10. If, however, a remonstrance is filed setting forth that the petitioner is disqualified, because not a citizen of the United States, or not of temperate habits, or not of good moral character, it is the duty of the court to hear the case, and, if the remonstrance is sustained by evidence, to refuse the license; and the refusal, on such grounds alone, is the exercise of a discretionary power which is not reviewable. *Ibid.*, 507.

11. In granting licenses to wholesale dealers, brewers, distillers, etc., under the act of May 24, 1887, P. L. 194, the Court of Quarter Sessions of Philadelphia county has not the large discretion conferred upon it by the retail act of May 13, 1887, P. L. 108. *Prospect Brewing Co.'s Petition*, 523.

12. The discretion conferred upon that court by the act of May 24, 1887, is a qualified and limited discretion, and is confined to the inquiry whether the applicant for a wholesale license is a citizen of the United States, of temperate habits, and of good moral character. *Ibid.*, 523.

13. Where no objection or remonstrance appears on the record of the case, alleging that the petitioner was disqualified in respect of either of the above grounds, citizenship, temperate habits, or moral character, the order of the court refusing the license to the petitioner will be reversed. *Ibid.*, 523.

14. The said act of May 24, 1887, confers upon that court no power to determine the fitness of a person to receive a wholesale license upon the findings of the court upon other matters outside of the qualifications mentioned, to wit: citizenship, habits or moral character. *Ibid.*, 523.

15. The return to a writ of alternative mandamus requires the greatest possible certainty; not merely certainty to a common intent, or certainty to a certain intent in general, but certainty to the greatest possible intent; or, as it is sometimes called, certainty to a certain intent in every particular. *Ibid.*, 523.

16. A return to such writ directed to a Court of Quarter Sessions refusing the petition of a corporation for a brewer's wholesale license, setting forth that an averment of the relator's petition was incomplete, inaccurate and misleading, but not showing in what respect; that the company had conducted its business in violation of law, but not showing what law; that the company was not a fit person to receive the license applied for, but not showing a cause of disqualification within the law; that the company did not possess a good moral character, but

not averring that the officers and directors thereof, were respectively men of bad moral character; such return is insufficient. *Ibid.*, 523.

17. The provision of § 2, act of May 24, 1887, P. L. 194, that licenses of wholesale dealers in liquors "shall be granted only by the Court of Quarter Sessions of the proper county, in such manner as is provided by existing laws," is constitutional and operates to repeal the provisions of the act of April 3, 1872, P. L. 843, relating to the sale of liquors in Allegheny county, so far as they authorize such licenses to be granted by the county treasurer. *Commonwealth v. Hill*, 540.

18. The provision of the wholesale license act of May 24, 1887, P. L. 194, that licenses to dealers, brewers, distillers, bottlers, etc., shall be granted "in such manner as is provided by existing laws," does not incorporate into that act the discretionary powers conferred upon courts by the act of May 13, 1887, P. L. 108. *Nordstrom's Petition*, 542.

19. In the absence of any local law in force in Jefferson county to the contrary, the general act of March 22, 1867, P. L. 40, a supplement to the act of March 31, 1856, P. L. 200, is in force in said county, and is to be taken as the existing law therein, referred to in the provision quoted from the said act of May 24, 1887, P. L. 194. *Ibid.*, 542.

20. The act of March 22, 1867, P. L. 40, places wholesale licenses and retail licenses upon the same plane, and confers upon the Courts of Quarter Sessions the same discretion in granting or refusing a wholesale license as in the case of an application for a retail license: *Reed's Appeal*, 114 Pa. 452. *Ibid.*, 542.

21. The Court of Quarter Sessions, in the exercise of a lawful discretion, may refuse to approve the bond accompanying an application for license, when the name of a surety upon the bond and to the jurat as to the sufficiency thereof was erased when presented, and the erasures were without explanation. *Ibid.*, 542.

22. Wherefore, when the return to an alternative writ of mandamus sets forth as grounds for the refusal of a wholesale license in said county, such a defective bond, and that the license was refused because, in the opinion of the court, the conservation of the public peace and morals demanded it, the peremptory writ will be refused. *Ibid.*, 542.

23. Where the general laws relating to the granting of licenses, to wit, the acts of March 31, 1856, P. L. 200; April 20, 1858, P. L. 365; March 22, 1867, P. L. 40, were in force prior to the act of May 24, 1887, P. L. 194, the granting or refusing of licenses to wholesale dealers in liquors continues to be within the discretion of the Court of Quarter Sessions of the proper county. *Knarr's Petition*, 554.

24. Wherefore, when, from the petition for an alternative mandamus and the accompanying record, it appears that the Court of Quarter Sessions of Jefferson county heard an application for a wholesale license, and upon due consideration refused it, although no objection or remonstrance was filed of record, the writ will be refused. *Ibid.*, 554.

25. The office of a mandamus, in such cases, is to require the performance of a judicial function: if a judge refuse or neglect to hear, the Supreme Court will enjoin upon him the performance of that duty; but, when he has heard and determined, the exercise of his discretion will

not be revised unless in extreme cases: *Raudenbusch's Petition*, 120 Pa. 328; *Commonwealth v. McLaughlin*, 120 Pa. 518; *Newlin's Petition*, 123 Pa. 541. *Ibid.*, 554.

LIEN.

See CHARGE ON LAND.

LIFE-ESTATE.

1. The act of January 24, 1849, P. L. 677, prohibiting an execution sale of a life interest in real estate except upon notice to the life-tenant and with leave of court, etc., has no application to the sale of a life estate under a *levari facias* upon a mortgage given by the life-tenant, and such sale will pass his entire interest. *Datesman's Appeal*, 348.

2. Where an auditor appointed to distribute the proceeds of such a sale, finds upon sufficient evidence that the mortgage under which the property was sold was given for the benefit of the life-tenant alone, the remaindermen having joined in it to perfect the security, the mortgage debt, as well as the costs and the expenses of audit, must be paid out of the interest of the life-tenant. *Ibid.*, 348.

3. In distributing a balance remaining after payment of the debt and costs, where a life estate and the remainder are sold together under a mortgage given for the debt of the life-tenant, it is not error to fix the life interest at one third the value of the land, to charge against it the mortgage debt and all costs, and award to the remaindermen the other two thirds in cash. *Ibid.*, 348.

4. Two methods of distribution are lawful: One, to treat the surplus as real estate and direct its investment, until with its accumulations it reaches the value of the land sold, and then award the interest on the amount to the life-tenant during life, and at his death the corpus to the remaindermen; the other, to value the life interest, give the tenant thereof his share in cash, and divide the balance in cash to the remaindermen. *Ibid.*, 348.

5. A life-tenant is not to be allowed, out of the proceeds of a sheriff's sale of the entire estate in lands, the amount expended by him for permanent improvements, when they were trifling and unimportant in character and there was no evidence adduced to show that they were made with the consent of the remaindermen. *Ibid.*, 348.

LIFE INSURANCE.

See INSURANCE, LIFE.

LIMITED PARTNERSHIP.

1. Where the recorded statement of a limited partnership organized under the act of June 2, 1874, P. L. 271, set out that the total amount of capital was \$25,000 "payable in lawful money on the execution hereof," but the association began business with no part of its capital paid in, and opened and kept no subscription list book, its organization was not in

compliance with the requirements of the act and the members were liable as general partners. *Hill v. Steller*, 145.

2. Persons who subscribe but do not contribute, and who by failing to keep a "subscription list book," as required by the act, withhold from the public the means of knowing the amount of capital within reach, are not within the protection of the act, but are liable individually as general partners, including a member subsequently coming in affected with notice of the defective organization. *Ibid.*, 145.

3. While it is not necessary that the entire capital should be paid in, before a limited partnership may begin business, yet it has no right to begin until some part of its capital subscribed has been actually paid; its statement should show when and in what amounts the subscriptions are to be paid, and the subscription list book required should thereafter show the payment or non-payment of the instalments as they fall due. *Ibid.*, 145.

4. The act of May 1, 1876, P. L. 89 (supplementary to the limited partnership act of June 2, 1874, P. L. 271), authorizing subscriptions to the capital of a limited partnership to be made in property other than cash, contemplates property available for the business of the company and for the payment of its creditors. *Vanhorn v. Corcoran*, 255.

5. The certificate must set forth, in its statement, such a description of the property contributed as will enable creditors to ascertain precisely of what the property consisted, and to judge of its value; otherwise, the requirements of the act as to a description of the property are not complied with. *Ibid.*, 255.

6. Where the statement of the recorded certificate showed that a subscriber "paid in merchandise, lumber, book accounts and bills receivable, transferred to this association, \$21,609.18, and in cash \$3,390.82, making a total subscription \$25,000," the description of the property contributed was insufficient. *Ibid.*, 255.

7. In such case, it was made to appear that the \$21,609.18, so contributed, represented the difference between the estimated assets and liabilities of a firm subscribing to the capital of the association, and if the statement had certified "in this respect according to the fact," the organization would have been defective. *Ibid.*, 255.

8. Parties doing business as a limited partnership under a defective certificate of organization, are liable as general partners to a common law action, and creditors are not confined to the remedy provided by § 2, of the act of June 2, 1874. *Ibid.*, 255.

LIQUORS.

See LICENSE TO SELL LIQUORS.

LUNATICS' ESTATES.

Upon the petition of the committee of an habitual drunkard, exhibiting an itemized account of his costs and praying that the court approve and order the payment of the same, a decree was made and entered upon the judgment docket that the estate of the drunkard pay said costs:

such order was in the nature of a final decree in equity for the payment of money, and had all the effect of a lien from its entry in the judgment docket. *Hohman's Appeal*, 209.

MANDAMUS.

See **BOROUGHs**.

See **LICENSE TO SELL LIQUORS**.

1. The return to a writ of alternative mandamus requires the greatest possible certainty; not merely certainty to a common intent, or certainty to a certain intent in general, but certainty to the greatest possible intent; or, as it is sometimes called, certainty to a certain intent in every particular. *Prospect Brewing Co.'s Petition*, 523.

2. A return to such writ directed to a Court of Quarter Sessions refusing the petition of a corporation for a brewer's wholesale license, setting forth that an averment of the relator's petition was incomplete, inaccurate and misleading, but not showing in what respect; that the company had conducted its business in violation of law, but not showing what law; that the company was not a fit person to receive the license applied for, but not showing a cause of disqualification within the law; that the company did not possess a good moral character, but not averring that the officers and directors thereof, were respectively men of bad moral character; such return is insufficient. *Ibid.*, 523.

MARRIED WOMAN.

See **HUSBAND AND WIFE**.

MEASUREMENT OF TIMBER.

(a) Plaintiff made a contract with defendants to cut and skid timber at a certain price per thousand feet, the logs to be measured by Scribner's Rule. When the logs were cut and skidded, they were measured by the parties, the contract price paid and a receipt in full given. After some of the logs had been sawed, plaintiff, alleging a mistake against him in the measurement upon which he had settled, remeasured the unsawed logs and brought suit for the difference in the whole.

1. In such case, the mistake in the first measurement being shown, that measurement and the settlement thereon would not bar recovery in this action, and it was not error to charge the jury that if the plaintiff was to have the benefit of the mill measurement of the logs that had been sawed, he should be bound by that measurement of the logs unsawed and re-measured by him. *Horton v. Harbridge*, 11.

MISTAKE.

See **MEASUREMENT OF TIMBER**.

See **MORTGAGE**.

MORTGAGE.

(a) A mortgage, by a clerical error, described certain lots conveyed

as in block 17 instead of in block 7. The description of the lots, both as to boundaries and improvements, could apply only to lots in block 7. After the mortgagor died, a decree re-forming the mortgage was obtained by bill in equity, all the heirs being made parties.

1. In such case, whether notice of the proceeding in equity to an heir as an heir did or did not bind him as a judgment creditor was immaterial, for the mortgage, as to an heir familiar with the property for years and whom the misdescription could not deceive, was a valid conveyance without re-formation. *Cake v. Cake*, 400.

MUNICIPAL BONDS.

1. When bonds are issued by a borough to provide for the payment of an existing indebtedness recognized by the corporate authorities as a legal obligation, but the provisions of § 10, article IX. of the constitution, and of § 2, act of April 20, 1874, P. L. 65, are not complied with, the bonds are issued without authority and are void. *Rainsburg Bor. v. Fyan*, 74.

2. If, however, the debt is a lawful one, and the money borrowed is applied to an existing valid indebtedness, thus merely exchanging one creditor for another, the borough is liable for the money and recovery may be had against it on a count upon the simple contract for money loaned. *Ibid.*, 74.

MUNICIPAL CLAIMS.

See STREETS.

MUNICIPAL INDEBTEDNESS.

See BOROUGHs.

NATIONAL BANKS.

See BANKS AND BANKING.

NEGLIGENCE.

1. Township officers are bound to anticipate and provide for the ordinary needs of travel conducted in the ordinary manner, and to remove obstructions and defects which would naturally or probably cause injury to the traveler along the highway. *Jackson Tp. v. Wagner*, 184.

2. But where the highway is an ordinary country road through an open cultivated region, with no unusual dangers or exposures, such officers are not bound to anticipate the dangers to which a broken wagon or a frightened horse may expose the driver. *Ibid.*, 184.

3. Where the plaintiff's horse, driven upon a highway, was frightened at an object for the presence of which in the highway the township was not responsible, and, turning suddenly, broke off a wheel, and dragged and overturned the carriage upon a stone heap at the roadside at a point where the roadway was not unsafe for ordinary travel, the township is not liable for the resulting injuries. *Ibid.*, 184.

(a) A city street was crossed at right angles by the main tracks and sidings of the defendant company's railroad, the main tracks being north of two of the sidings. South of these tracks and sidings and separated from them about seven feet were the tracks and sidings of another railroad company. Safety-gates were maintained at the crossing, in obedience to a city ordinance.

(b) About 7 A. M. the plaintiff and a companion, occupying and driving a two-horse wagon, approached the crossing from the south, but before driving over they stopped, looked and listened. The safety-gates were raised and no watchman was present. The south sidings of defendant's line were occupied in both directions by box cars, which obstructed the view of the main track.

(c) While the two men were stopping and looking, a hand-car on one of defendant's main tracks passed eastward from behind the box cars, and they then drove across without again stopping to look and listen, and as they reached the main track they were struck by another hand-car passing rapidly on the same track in the same direction.

4. The foregoing facts appearing in the plaintiff's case, in his action for damages, it was proper that the question whether he was guilty of contributory negligence or not should be left to the jury, and it was not error to refuse to enter a judgment of compulsory nonsuit. *Lake Shore etc. Ry. Co. v. Frantz*, 297.

5. The duty to stop, look and listen is absolute and imperative, and the fact that the safety-gates were raised did not release the plaintiff from its observance; yet, on the other hand, it was some evidence of negligence on the part of the defendant, and as such was a proper subject of the comments made thereon to the jury. *Ibid.*, 297.

6. The trial judge charged that the jury might consider the pain and suffering the plaintiff "has undergone, and may undergo in the future;" but the idea of compensation was fairly brought to their attention in the enumeration of the elements of the damages allowable, and, taken with its context, there was no substantial error in the instruction. *Ibid.*, 297.

(a) In an action by a passenger to recover damages for personal injuries received while alighting from the defendant company's train, there was evidence that the plaintiff delayed leaving the car when the train stopped, and attempted to alight after the train started, though warned by the brakeman against it.

7. It was error in such case to refuse to charge, as requested, that "if the jury believe from the evidence that the plaintiff undertook to get off the train after it began to move, in disregard of the warning of the brakeman not to, she was guilty of contributory negligence and cannot recover." *New York etc. R. Co. v. Enches*, 316.

8. Where the question of contributory negligence is fairly raised upon the evidence, it is not enough to charge generally that the plaintiff cannot recover, if guilty of contributory negligence: the court should explain to the jury what facts would constitute such negligence, in view of the testimony, and instruct the jury accordingly. *Ibid.*, 316.

9. In an action against a railroad company to recover damages for

personal injuries, it appeared that the injuries were inflicted upon the track and by the engine and cars of another company. There was no direct testimony that the road of such company was then owned or leased by the defendant; yet, there being evidence of facts and circumstances sufficiently tending to show that the defendant then operated it, it was not error to submit the question of defendant's responsibility to the jury. *Penna. R. Co. v. Sellers*, 406.

NEGOTIABLE INSTRUMENT.

See NOTES AND BILLS.

NOTES AND BILLS.

1. The cashier of a national bank, holding the paper of a firm of which the cashier is a member, has no power to bind the bank by an agreement that there shall be no liability upon an accommodation note procured by him to be substituted, for a special purpose, for the indebtedness of his firm. *Allen v. First N. Bank*, 51.

2. Nor may the accommodation maker defend upon the ground that his note was procured by the cashier, a member of such debtor firm, to cover up from the bank examiner, by such substitution, the fact that the bank had loaned to the firm in excess of ten per cent of its capital stock. *Ibid.*, 51.

3. It is no defence to the maker of an accommodation note discounted by a bank, that the bank had discounted paper of another person or firm to an amount exceeding the one tenth of its capital: *O'Hare v. Second N. Bank*, 77 Pa. 96; *Mapes v. Second N. Bank*, 80 Pa. 163. *Ibid.*, 51.

(a) In an action by an accommodation indorser against the maker, to recover the amount paid by plaintiff to lift a note from bank, an affidavit of defence averred that the note was made fraudulently, was without consideration, and that the plaintiff had knowledge of these facts when his indorsement was made.

4. In such case, the plaintiff was not entitled to summary judgment under the procedure act of May 25, 1887, P. L. 271, because (1) his statement of claim did not aver that the bank was a bona fide holder of the note for value, and (2), even with such an averment, the protection afforded would not extend to a party to the original fraud. *Erie Boot & Shoe Co. v. Eichenlaub*, 164.

NOTICE OF ASSESSMENTS.

See INSURANCE, FIRE.

NUDUM PACTUM.

See CONTRACT.

NUISANCE.

(a) A street railway company, as required by its incorporating act, ob-

tained the consent of borough authorities to occupy a public street, but upon condition that its track should be laid in the centre line thereof and in such manner that vehicles could cross without hindrance.

(b) The track was laid in the centre line of the street, as required by the action of council, but upon an open space formed by the intersection of other streets there was a slight deflection of the track from the centre line, to enter upon the private property of the company.

1. The company being indicted for maintaining a nuisance in unlawfully obstructing the street by means of its track, in the absence of any averment in the indictment, or in an offer of proof, that the structure of the track, or its position, interfered in point of fact with public travel in any respect, the mere location of it did not constitute a nuisance, and the offer was inadmissible. *Commonwealth v. Wilkes-Barre etc. Ry. Co.*, 278.

OIL- AND GAS-LEASE.

(a) In 1881, Marsh and Kuhn procured an oil-lease subject to forfeiture on failure to operate thereunder. No operations were begun, but on August 4, 1883, the lease was renewed on condition that active operations should begin within 30 days, and on the same day M. and K. assigned a one third interest to Weible.

(b) Operations were begun, but discontinued. On May 9, 1884, a new lease was made by the landowners to Brown, who on May 12th assigned a one half interest therein to C. and J., and the other one half interest to Weible. Operations under this lease were successful, and on June 18th, Kuhn filed a bill in equity to establish his one third interest in the leasehold and for an injunction and account.

(c) The master found, upon the facts in evidence, that Brown, in procuring the lease of May 9th, was the agent of Weible; that Kuhn's rights under the original lease and renewal were not affected by the new lease; that the one third interest under the new lease was held in trust for Kuhn; and, stating an account, awarded a sum certain to Kuhn as his one third of the accrued production.

1. The court below having confirmed the reports of the master and decreed accordingly, the record, on appeal to the Supreme Court, showing that the proceeding involved questions of fact and account, merely, all of which had been satisfactorily adjusted by the master and court below, the decree was affirmed and the appeal dismissed. *Weible's Appeal*, 34.

ORPHANS' COURT.

See ACCOUNTS.

See DECEDENTS' ESTATES.

See DISTRIBUTION.

1. Notwithstanding the language ("shall grant") of § 1, act of October 13, 1840, P. L. (1841) 1, an account settled and confirmed by the Orphans' Court can be reviewed only for error of law apparent on the face of the record, or for new matter which has arisen since the decree. *Simpson's App.*, 18 W. N. 175, distinguished. *Priestley's Appeal*, 420

2. The bill of review must be founded upon some error apparent upon the bill or petition, answer and other pleadings, and decree, which together constitute the record; and the evidence cannot be looked into to support an objection based upon the supposed error of the court in its deductions therefrom. *Ibid.*, 420.

3. But, as a matter of grace, a review may be granted for new proof discovered after the decree, which proof could not possibly be used at the time when the decree was made; yet, where the party complaining has been guilty of laches after notice of the decree, the bill should not be granted. *Ibid.*, 420.

4. The notice by advertisement, directed by law, that an account has been filed and will be presented to the Orphans' Court for confirmation, is effective upon any person or persons entitled to come in and object to the decree. *Ibid.*, 420.

5. And where the petition for a bill of review of an account confirmed, alleges no error of law apparent on the face of the record, but error merely in the amount of commissions allowed to accountant, determinable on the facts, and there is no allegation of after-discovered testimony, the petition should be refused. *Ibid.*, 420.

6. An order, pending exceptions to an auditor's report, directing payment of an award to a creditor unaffected by them, is a matter within the discretion of the court, and the creditor's omission to apply for such order is not laches. *Pomeroy's Appeal*, 492.

PARTIES TO ACTIONS.

See PRACTICE.

PARTNERSHIP.

See ACCOUNTS.

(a) At a sheriff's sale on a writ from a judgment confessed on an individual note, given by one of two partners for money borrowed and used for the benefit of the firm, certain property was purchased by the judgment creditor.

(b) Learning afterwards that the property was partnership property, and fearing his title thereto was imperfect, the purchaser obtained from the partners a firm note, on which a judgment was confessed, execution issued, sale had, and the same property again purchased by him.

1. In equity, as between the parties, the first execution sale was inoperative as a satisfaction of the indebtedness; in the second execution sale upon a judgment which was for the same debt, executed and accepted in entire good faith, there was no fraud upon other creditors and the purchaser's title was thus perfected. *Stevens v. Diehl*, 416.

2. An agreement between persons engaging in business that each is to share directly in the profits as such, constitutes them partners as to third persons, whatever their arrangement may be between themselves; and in an action against them, as partners, to recover the price of goods sold after the date when the agreement was to expire, it is not error to

instruct the jury that if they find the defendants continued to do business under the agreement, they were liable as copartners. *Caldwell v. Miller*, 442.

PARTNERSHIP, LIMITED.

See LIMITED PARTNERSHIP.

PAVING AND CURBING.

1. A municipal ordinance providing for the paving and curbing of a city street, enacted subsequently to the act of May 1, 1876, P. L. 94, is null and void, if before its passage the councils have not caused an estimate to be made of the total cost of such improvement, maps, etc., thereof, and had the same attached to the ordinance, as required by said act. *Erie City v. Brady*, 169.

2. When such an estimate has not been previously made and attached to the ordinance at its passage, the defect is not cured by the provisions of § 2, act of May 17, 1887, P. L. 118, that "all taxes heretofore levied in any cities of the third, fourth and fifth classes, . . . and all assessments, made in pursuance of the ordinances of such cities, are hereby made valid." *Ibid.*, 169.

3. When in fact the provisions of the act of 1876 were formally complied with by the city engineer, but the estimate made was not such as the defendant considered sufficient, the proper method to state the defence was to set out a copy of the estimate with an averment of the defects in it. *Ibid.*, 169.

4. If, however, the defendant assume the responsibility of being sworn to matters which were admittedly conclusions of law, but which were stated in unqualified language as positive averments of fact, such a course cannot be too strongly reprobated: per Mr. Justice MITCHELL. *Ibid.*, 169.

PAYMENT.

See PRESUMPTION OF PAYMENT.

1. An award by the Orphans' Court to a creditor of a decedent, of the amount of his claim out of funds adjudged to be in the hands of an executor, is not the equivalent in law of actual payment of the claim. *Pomeroy's Appeal*, 492.

2. If such creditor, by reason of the executor's insolvency, fail to receive payment of the sum awarded him, he is entitled to come in upon a second fund raised in the same estate for a pro rata share thereof. *Ibid.*, 492.

PERFORMANCE.

See CONTRACT TO BUILD.

(a) In an action on an entire contract, whereby the plaintiff agreed to do the plumbing in the defendant's houses and to furnish the materials, including specified kinds of closets and heaters, the whole to be done in a workmanlike manner, the evidence as to the plaintiff's compliance with the contract being conflicting, it was not error for the court to instruct the jury in the general charge and in answer to points:

1. That if the plaintiff acted honestly, and in good faith substantially performed the contract, that was sufficient, and, if in certain minor particulars the contract was not complied with, the jury might deduct from the plaintiff's damages, the difference between the value of the work as it was turned over to the defendant, and what it would cost to have it completed in strict conformity with the contract. *Sticker v. Overpeck*, 446.

PENALTY, OR STIPULATED DAMAGES?

(a) A contract under seal for the sale of an omnibus line provided: "And the party of the first part are not to engage in or use their influence in opposition to the party of the second part, in the passenger, mail or express business in any manner or form. And each party is hereby held and fully bound in the sum of \$300 for the faithful fulfilment of the above contract."

1. The last provision contemplated a penalty rather than stipulated damages, and, in an action for the breach of his covenant by the vendor in re-engaging in the same business, the vendee was entitled to recover the actual damages he had sustained. *Moore v. Colt*, 289.

2. In such action, it was not error to admit testimony that defendant, in violation of his covenant, had carried a certain number of passengers, which at the regular rates amounted to a certain sum, as evidence of the damages to which plaintiff was entitled. *Ibid.*, 289.

PERSONALTY, OR REALTY?

1. Where, in determining whether an engine, boiler and machinery in a saw-mill upon land sold at sheriff's sale are part of the realty or not, the testimony as to the actual character of the structure, whether movable or permanent, is conflicting, the issue becomes a question of fact for the jury: *Harmony B. Ass'n v. Berger*, 99 Pa. 320. *Benedict v. Marsh*, 309.

2. In such case, should the jury be unable to find, from the conflicting testimony, that the mill was in fact a permanent structure, proof of the ante litem motam declarations of the owner and builder may be considered as evidence of his purpose at the time the mill was erected. *Ibid.* 309.

PLEDGOR AND PLEDGEE.

1. A certificate of stock, issued by a corporation having legal power to issue such certificates, is a continuing affirmation that the holder therein named is the owner of the amount of stock specified, upon which a purchaser or pledgee, dealing with the person named in the certificate or his assignee, has a right to rely as against the corporation. *Kisterbock's Appeal*, 601.

2. If upon the faith of a regularly issued stock certificate, a purchaser or pledgee of stock, which in fact has been fraudulently and collusively issued by officers of the corporation, advances money or parts with anything of value, the corporation is bound by way of estoppel to indemnify him to the extent of his expenditure, against loss in consequence of the falsity of the certificate. *Ibid.*, 601.

3. A holder of such a certificate, who has received it as collateral security for a pre-existing debt from the person in whose name it was fraudulently issued, being uninjured by the falsity of the statements which it contains, has no claim upon it which he can enforce against the corporation. *Kisterbock's Appeal*, 601.

4. Such a certificate is worthless, as a certificate, and gives no rights of its own force. A transfer thereof passes to the transferee no right or claim to shares of stock. The only right which can exist upon it, as against the corporation, is created by the act of parting with a valuable consideration in reliance upon its statements. *Ibid.*, 601.

5. When such a certificate is given in pledge, the thing pledged is not shares of stock, but merely a right to call upon the corporation for indemnity against any loss suffered in consequence of reliance upon its representation that the person therein named is the owner of the shares therein mentioned. *Ibid.*, 601.

6. If a fraudulent certificate is pledged by one who has no claim to indemnity thereon, and the pledgee receives, in settlement of his claim to be indemnified for his advances made on the pledge, genuine shares of stock, surrendering the spurious shares so pledged, such genuine shares do not become a substituted pledge in his hands, but are his absolutely. *Ibid.*, 601.

7. Wherefore, a pledgor of such certificate, who has himself no claim to be indemnified thereon, is not entitled to recover from his pledgee who advanced money to him on the faith of it, any part of what the latter may have received from the corporation upon his claim for indemnity, although such claim may have been paid in genuine shares which afterwards increased in value to an amount exceeding the debt of the pledgor to the pledgee. *Ibid.*, 601.

POOR PERSON.

Whether, under § 33, act of June 13, 1836, P. L. 548, a poor district which has supported a poor person, can maintain a claim in the Orphans' Court for reimbursement out of choses in action falling due after his death and collected by his administrator, not decided. *Mumma's Appeal*, 474.

PRACTICE.

See AFFIDAVIT OF DEFENCE.

See APPEAL.

See ATTACHMENT FOR FRAUD.

See AUDITOR.

See BILL OF REVIEW.

See CHARGE TO JURY.

See COURT AND JURY, PROVINCE OF.

See ISSUE DEVISAVIT VEL NON.

See MANDAMUS.

See REFERENCE.

See STATEMENT OF CLAIM.

In Supreme Court, see SUPREME COURT.

1. Where, in a proceeding by a creditor in the Court of Quarter Sessions under the act of April 22, 1887, P. L. 61, to enforce by mandamus the collection of a special tax sufficient to pay an indebtedness alleged, the petition of citizens and taxpayers of the borough for leave to intervene is refused, the petitioners have no standing to be heard upon the matter on appeal or certiorari in the Supreme Court. *Hower's Appeal*, 134.

2. When, in such a proceeding, the borough files an answer admitting the indebtedness but averring that the treasury is empty and that the revenues which the borough may lawfully raise by taxation in any one year are inadequate to meet the claim, such admission is equivalent to a judgment in favor of the petitioner, and will entitle him to a decree in his favor: per BUCHER, P. J. *Ibid.*, 134.

3. The right of a citizen and taxpayer of a borough, to become a party to any suit or process pending against the borough, etc., under the provisions of the act of March 23, 1877, P. L. 20, exists only where the proceedings in which he applies to intervene are instituted in the Court of Common Pleas: per BUCHER, P. J. *Ibid.*, 134.

4. If the plaintiff, filing a statement of claim in assumpsit under the procedure act of May 25, 1887, P. L. 271, neglect to serve a copy thereof upon defendant before return day or to give notice of the filing of it after return day, a judgment taken for want of an affidavit of defence is without authority and will be stricken off on motion. *Marlin v. Waters*, 177.

5. Under said act, if plaintiff would hold the defendant to an affidavit of defence to be filed on return day, he must have served a copy of the statement fifteen days before that day; but, if a copy be not thus served fifteen days before return day, judgment for default of the affidavit may be taken fifteen days after notice of the filing of the statement. *Ibid.*, 177.

6. The clause in § 5 of said act, providing that judgment may be moved for, "in accordance with the present practice," etc., refers only to the mode of obtaining judgment, and specially to taking it for part of plaintiff's claim, but does not authorize judgment to be taken under a rule of court without service of a copy of the statement filed or notice of such filing. *Ibid.*, 177.

7. If, upon the trial of an appeal from the judgment of a justice of the peace, the cause is tried upon its merits, without regard to the amount of the plaintiff's claim or of the defendant's set-off, it is too late, when all the testimony is before the jury, for the plaintiff to ask to have the defendant's evidence of set-off withdrawn from the jury, on the ground that its amount exceeds the jurisdiction of the justice. *O'Ferrall v. Moore*, 234.

8. Where there is evidence tending to establish the existence of facts hypothetically stated in a point presented for instruction, the proponent

has a right to a specific instruction upon the legal effect of those facts, and it is error to refer that legal effect to the jury. *New York etc. R. Co. v. Enches*, 316.

PRESUMPTION OF PAYMENT.

1. In an action upon a note under seal, brought within twenty years from the time the right of action accrued, the burden is upon the defendant to prove payment, or facts and circumstances from which the jury may properly infer payment. *Morrison v. Collins*, 28.

2. In such action, the fact that the holder was constantly pressed for money, while the defendant was abundantly able to pay, with other circumstances, might justify the presumption of payment within the twenty years, yet such presumption would not arise from the single fact that the defendant was able to pay. *Ibid.*, 28.

3. The fact that in a settlement of open accounts between the parties, about six years after the date of the note, a balance equal to the amount of the note was found in favor of the maker, while not establishing a set-off, because of the statute of limitations, was yet admissible as tending to establish payment. *Ibid.*, 28.

PROMISE IMPLIED.

See ASSUMPSIT, IMPLIED.

PROMISSORY NOTES.

See NOTES AND BILLS.

RAILROADS.

In an action against a railroad company to recover damages for personal injuries, it appeared that the injuries were inflicted upon the track and by the engine and cars of another company. There was no direct testimony that the road of such company was then owned or leased by the defendant; yet, there being evidence of facts and circumstances sufficiently tending to show that the defendant then operated it, it was not error to submit the question of defendant's responsibility to the jury. *Penna. R. Co. v. Sellers*, 406.

REALTY, OR PERSONALTY?

1. Where, in determining whether an engine, boiler and machinery in a saw-mill upon land sold at sheriff's sale are part of the realty or not, the testimony as to the actual character of the structure, whether movable or permanent, is conflicting, the issue becomes a question of fact for the jury: *Harmony B. Ass'n v. Berger*, 99 Pa. 320. *Benedict v. Marsh*, 309.

2. In such case, should the jury be unable to find, from the conflicting testimony, that the mill was in fact a permanent structure, proof of the ante litem motam declarations of the owner and builder may be

considered as evidence of his purpose at the time the mill was erected. *Ibid.*, 309.

RECOGNIZANCE.

See BOND.

(a) The defendant in a desertion case was ordered to give security to the commonwealth to pay a weekly sum to his wife, the complainant, and to be committed to the county jail until the order was complied with.

(b) On the same day of the order, the defendant, with others as his sureties, executed a voluntary bond, acknowledged before the clerk, conditioned that the defendant should appear at the next Court of Quarter Sessions and give the required security.

1. The said bond was a valid obligation, and, in the absence of an averment in the affidavit of defence, that the defendant had complied with its condition or of any facts that in law were the equivalent of a surrender, the plaintiff in interest was entitled to summary judgment. *Berkstresser v. Commonwealth*, 15.

2. The surety on the recognizance of a defendant convicted of desertion, conditioned that the defendant will pay a weekly sum for the support of his wife, cannot be absolved from liability by an offer to surrender the body of the principal: the obligation of the recognizance is voluntary and can be discharged only by payment according to its terms. *Miller v. Commonwealth*, 122.

REFERENCE.

See SUBMISSION TO ARCHITECT.

1. The submission of a cause, under the provisions of the act of May 14, 1874, P. L. 166, to a person learned in the law but not authorized to act as an attorney in the Supreme Court of this state, is erroneous, and all proceedings under it, with the award made, are invalid. *Campbell v. Fayette Co.*, 86.

2. County commissioners, representing the people of a county, act in a fiduciary capacity, and are without authority to submit a case to the decision of the court under the act of April 22, 1874, P. L. 109; wherefore, they may not legally enter into a submission to a person learned in the law, under the act of May 14, 1874, P. L. 166. *Ibid.*, 86.

3. In the case at bar, the submission having been made by the county commissioners, as one of the parties, to a person learned in the law but unauthorized to act as an attorney in the Supreme Court, the entire proceeding was abortive, and the court where the cause was pending had ample power to set it aside. *Ibid.*, 86.

RE-FORMATION.

(a) A mortgage, by a clerical error, described certain lots conveyed as in block 17 instead of in block 7. The description of the lots, both as to boundaries and improvements, could apply only to lots in block 7.

After the mortgagor died, a decree re-forming the mortgage was obtained by bill in equity, all the heirs being made parties.

1. In such case, whether notice of the proceeding in equity to an heir as an heir did or did not bind him as a judgment creditor was immaterial, for the mortgage, as to an heir familiar with the property for years and whom the misdescription could not deceive, was a valid conveyance without re-formation. *Cake v. Cake*, 400.

RELEASE.

1. Where land is devised at a valuation or price to be paid by the devisee, the money payable becomes a charge on the land in the hands of the devisee accepting the devise, with a lien which is superior to the lien of judgments subsequently entered against the devisee. *Lancaster Co. N. Bank's Appeal*, 214.

2. Releases executed by trustees of the person entitled to the valuation money, acknowledging payment thereof, though duly recorded prior to the entry of judgments against the devisee, do not relieve the land from the charge, if the evidence show that the money was not in fact paid and that the releases were without consideration. *Ibid.*, 214.

REPEALING STATUTE.

1. A general statute without negative words, does not repeal a previous statute which is particular, even though the provisions of one be different from the other. *Morrison v. Fayette Co.*, 110.

2. The act of May 12, 1887, P. L. 95, providing a fee of \$3 per day and mileage for the auditors "of each county," does not repeal the act of February 5, 1869, P. L. 117, providing a fee of \$3 per day, but without mileage, for the auditors of Fayette county. *Ibid.*, 110.

REPLEVIN.

1. Replevin will lie for an inclined plane connecting a railroad with defendant's ore mines, and located partly on land belonging to defendant and built by the plaintiff under an agreement that the defendant should have the use of it for a certain compensation during a determinate period, and which at the expiration of the period the defendant refused to deliver to the plaintiff. *Charlotte Furnace Co. v. Stouffer*, 336.

2. An agreement to pay a compensation for the use of a structure erected upon land, being prima facie inconsistent with ownership thereof by the person so agreeing, is evidence against him of a title to the structure in the person who is to receive the compensation, even though, as to the land occupied, the latter were tenant and the former landlord. *Ibid.*, 336.

RES JUDICATA.

(a) In an action of trespass for taking lumber, it appeared that the plaintiff's title to a larger lot of lumber had been determined by an

action of replevin between plaintiff and same defendant, and there was evidence that the lumber taken, if not a part of the lumber replevied, was lumber to which the plaintiff had the same title, which fact was known to the defendant.

1. In such case, it was error to charge the jury that if the lumber taken was not part of the lumber replevied, "the title was not adjudicated in the replevin suit as against the defendant, and their verdict should be in his favor." *Garey v. Woodward*, 251.

2. A proceeding by attachment under the act of March 17, 1869, P. L. 8, is to be regarded as a personal action, the attachment being intended to secure to the plaintiff a lien in advance, the efficacy of which will depend on the recovery of a final judgment against the defendant. *Miller v. Rohrer*, 385.

3. The prior recovery of a final judgment in another proceeding between the same parties upon the same cause of action, is a bar to the recovery of a judgment in the proceeding by attachment; and this, though the defendant in the attachment filed no bond under § 3 of the act. *Ibid.*, 385.

REVIEW.

See BILL OF REVIEW.

ROADS.

See HIGHWAYS.

SALES.

(a) By the "terms of consignment" attached to an invoice and accepted by the consignee, it was stated that the goods consigned were the property of the consignors, were so to remain until fully paid for, and that the consignors shipped and delivered them upon the express condition that the consignee should remit a sum certain therefor, within a time certain, or return the goods.

1. The transaction, evidenced by such terms, was not a bailment but a sale to the consignee, with an agreement that the title was to remain in the consignors until the price was paid: the arrangement was valid between the parties to it, but the secret lien attempted to be created could not affect the consignee's creditors. *Peek v. Heim*, 500.

2. Whatever the form of the agreement, if the purpose of it is to cover up a sale and preserve a lien in the vendors for the price of the goods, it is void as respects creditors of the vendee, whether the credit is given before or after the delivery of the goods; a consignment for such an object is no better than any other device. *Ibid.*, 500.

SCIRE FACIAS TO REVIVE.

See JUDGMENT.

(a) Pending a scire facias to revive a judgment, at issue under the

plea of nul tiel record, the defendant, alleging insufficiency of the power under which the judgment had been confessed, and also payment, presented a petition for a rule to strike off the judgment and to open the same to let in a defence.

1. The judgment having been entered thirteen years before the scire facias issued, and sixteen years before the petition was presented, and no reason assigned for the delay, it was not error to discharge the rule granted and to permit the defence of payment to be made upon the trial of the scire facias. *Richards' Appeal*, 63.

SET-OFF.

See CONTRACT.

SHERIFF'S SALE.

See LIFE-ESTATE.

1. Where the sheriff's vendee of real estate against which there was a subsisting mortgage, assumed the mortgage debt after the sale by giving his own mortgage for its amount, whereupon the original mortgage was satisfied, the transaction on its face is confirmatory of other evidence sustaining the contention of claimants upon the fund, that the property was sold subject to the original mortgage. *Hohman's Appeal*, 209.

(a) At a sheriff's sale on a writ from a judgment confessed on an individual note given by one of two partners for money borrowed and used for the benefit of the firm, certain property was purchased by the judgment creditor.

(b) Learning afterwards that the property was partnership property, and fearing his title thereto was imperfect, the purchaser obtained from the partners a firm note, on which a judgment was confessed, execution issued, sale had, and the same property again purchased by him.

2. In equity, as between the parties, the first execution sale was inoperative as a satisfaction of the indebtedness; in the second execution sale upon a judgment which was for the same debt. executed and accepted in entire good faith, there was no fraud upon other creditors and the purchaser's title was thus perfected. *Stevens v. Diehl*, 416.

3. Where the plaintiff in a judgment, without fraud or deceit, and through a voluntary payment made by the sheriff out of the proceeds of a judicial sale, receives the amount appearing to be due by the record of the judgment, which is more than the sum actually remaining due thereon, but not more than enough to extinguish the indebtedness of the defendant to him, he has a right to apply the excess to indebtedness other than the judgment. *First N. Bank v. Fair*, 324.

4. A person who, after the entry of a judgment and before a sheriff's sale of real estate thereunder, purchased the land from the defendant in the judgment, has no higher rights against the judgment plaintiff than the latter: if the defendant may not recover from the plaintiff money collected by means of an execution and sheriff's sale of the land

upon which the judgment was a lien, neither can such purchaser. *Ibid.*, 324.

SHERIFF'S INTERPLEADER.

1. Where, in a sheriff's interpleader, it was found that the claimant of the property, grain, stock, implements, which had been purchased at execution sales, left it with the execution defendant, who was made a tenant upon a farm rented by the claimant under an arrangement in good faith that the tenant should work the farm, keep up the property, and after taking out a support for himself and family turn over the surplus to the claimant, the transaction was not a fraud in law or in fact upon the tenant's creditors. *Rohland v. Rooke*, 139.

2. In a feigned issue to try the title to goods levied upon as belonging to a husband, but claimed by his wife, the declarations of the husband adverse to the claim of the wife, made in her absence and after the levy, are not admissible upon any theory. *Martin v. Rutl*, 381.

3. As declarations, they are secondary, not being those of the plaintiff herself; as declarations of an agent they are incompetent, because not part of the *res gestæ*; and finally they are incompetent because they are the declarations of a husband against his wife. *Ibid.*, 381.

STATEMENT OF CLAIM.

See AFFIDAVIT OF DEFENCE.

(a) In an action by an accommodation indorser against the maker, to recover the amount paid by plaintiff to lift a note from bank, an affidavit of defence averred that the note was made fraudulently, was without consideration, and that the plaintiff had knowledge of these facts when his indorsement was made.

1. In such case, the plaintiff was not entitled to summary judgment under the procedure act of May 25, 1887, P. L. 271, because (1) his statement of claim did not aver that the bank was a bona fide holder of the note for value, and (2), even with such an averment, the protection afforded would not extend to a party to the original fraud. *Erie Boot & Shoe Co. v. Eichenlaub*, 164.

2. If the plaintiff, filing a statement of claim in assumpsit under the procedure act of May 25, 1887, P. L. 271, neglect to serve a copy thereof upon defendant before return day, or give notice of the filing of it after return day, a judgment taken for want of an affidavit of defence is without authority and will be stricken off on motion. *Marlin v. Waters*, 177.

3. Under said act, if plaintiff would hold the defendant to an affidavit of defence to be filed on return day, he must have served a copy of the statement fifteen days before that day; but, if a copy be not thus served fifteen days before return day, judgment for default of the affidavit may be taken fifteen days after notice of the filing of the statement. *Ibid.*, 177.

4. The clause in § 5 of said act, providing that judgment may be moved for, "in accordance with the present practice," etc., refers only

to the mode of obtaining judgment, and specially to taking it for part of plaintiff's claim, but does not authorize judgment to be taken under a rule of court without service of a copy of the statement filed or notice of such filing. *Ibid.*, 177.

5. An averment in a statement of claim that a certain payment made by a third person, was made to apply on a particular judgment and should have been credited thereon, if unaccompanied by any allegation of an agreement or direction for such application, is no more than an expression of opinion, and is insufficient to support a claim depending upon an alleged right in the plaintiff to the allowance of such credit. *First N. Bank v. Fair*, 325.

STATUTORY LAW.

1. A general statute without negative words, does not repeal a previous statute which is particular, even though the provisions of one be different from the other. *Morrison v. Fayette Co.*, 110.

2. The act of May 12, 1887, P. L. 95, providing a fee of \$3 per day and mileage for the auditors "of each county," does not repeal the act of February 5, 1869, P. L. 117, providing a fee of \$3 per day, but without mileage, for the auditors of Fayette county. *Ibid.*, 110.

STREETS.

1. A municipal ordinance providing for the paving and curbing of a city street, enacted subsequently to the act of May 1, 1876, P. L. 94, is null and void, if before its passage the councils have not caused an estimate to be made of the total cost of such improvement, maps, etc., thereof, and had the same attached to the ordinance, as required by said act. *Erie City v. Brady*, 169.

2. When such an estimate has not been previously made and attached to the ordinance at its passage, the defect is not cured by the provisions of § 2, act of May 17, 1887, P. L. 118, that "all taxes heretofore levied in any cities of the third, fourth and fifth classes, . . . and all assessments, made in pursuance of the ordinances of such cities, are hereby made valid." *Ibid.*, 169.

3. When in fact the provisions of the act of 1876 were formally complied with by the city engineer, but the estimate made was not such as the defendant considered sufficient, the proper method to state the defence was to set out a copy of the estimate with an averment of the defects in it. *Ibid.*, 169.

4. If, however, the defendant assume the responsibility of being sworn to matters which were admittedly conclusions of law, but which were stated in unqualified language as positive averments of fact, such a course cannot be too strongly reprobated: per Mr. Justice MITCHELL. *Ibid.*, 169.

STREET RAILWAY COMPANY.

(a) A street railway company, as required by its incorporating act, obtained the consent of borough authorities to occupy a public street,

but upon condition that its track should be laid in the centre line thereof and in such manner that vehicles could cross without hindrance.

(b) The track was laid in the centre line of the street, as required by the action of council, but upon an open space formed by the intersection of other streets there was a slight deflection of the track from the centre line, to enter upon the private property of the company.

1. The company being indicted for maintaining a nuisance in unlawfully obstructing the street by means of its track, in the absence of any averment in the indictment, or in an offer of proof, that the structure of the track, or its position, interfered in point of fact with public travel in any respect, the mere location of it did not constitute a nuisance, and the offer is inadmissible. *Commonwealth v. Wilkes-Barre etc. Ry. Co.*, 278.

SUBMISSION.

See REFERENCE.

SUBMISSION TO ARCHITECT.

(a) A contract, whereby plaintiffs covenanted to erect County Home buildings for a stipulated sum, provided for authorized changes to be made in the work and materials when necessary, and for a reference of any disagreements between the parties to the conclusive decision of the architect.

(b) The plaintiffs claimed completion of the building according to the contract, and the county claimed deductions for deficiencies in work and materials, but no reference of the matters in dispute was ever made to the decision of the architect.

(c) The plaintiffs brought suit to recover the balance claimed, and on the trial the judge submitted the question of fact to the jury, instructing that the duty to refer disputes to the architect for settlement was mutual, and defendant could not take advantage of its own neglect.

1. On error, it was held that there was no such error apparent in the record as would justify a reversal of the judgment for the plaintiffs; that while the architect had made no formal award, he had practically settled the matters in dispute, and as he was now dead it would do no practical good to reverse because no such formal award had been made. *Fayette Co. v. Laing*, 119.

SUBROGATION.

See ACCOUNTS.

SUPREME COURT.

1. While an erroneous or voidable judgment cannot be affected by a writ of error not taken within the statutory period, a void judgment is no judgment at all, and the person affected by it has a right to have it stricken from the record, and to a writ of error to the refusal of such an order. *Clarion etc. R. Co. v. Hamilton*, 1.

2. But if a judgment be erroneously entered for want of an affidavit of defence by a court having jurisdiction of the person and subject matter, it is voidable and not void; and an order refusing to strike it from the record, on a motion made four years after its entry, will not be reversed. *Clarion etc. R. Co. v. Hamilton*, 1.

3. Where, in a proceeding by a creditor in the Court of Quarter Sessions under the act of April 22, 1887, P. L. 61, to enforce by mandamus the collection of a special tax sufficient to pay an indebtedness alleged, the petition of citizens and taxpayers of the borough for leave to intervene is refused, the petitioners have no standing to be heard upon the matter on appeal or certiorari in the Supreme Court. *Hower's Appeal*, 134.

4. An order setting aside an execution is in the nature of a final judgment, and a writ of error will lie thereto. *Feagley v. Norbeck*, 238.

5. Where, at the time a bond with warrant of attorney to enter judgment is executed, the obligee agrees in writing not to issue execution except on a specified contingency, it is not error to set aside an execution issued in violation of the agreement. *Ibid.*, 238.

6. The record showed that depositions had been filed to be read at the hearing of the rule to set aside the execution, but they were not furnished to the Supreme Court: In such case the finding of the court below, that the writ was issued in violation of the agreement, will be taken as correct. *Ibid.*, 238.

7. Upon a writ of certiorari to the order of the Court of Quarter Sessions revoking a license to sell liquors, under § 7, act of May 13, 1887, P. L. 110, neither the testimony nor the opinion of the court below form any part of the record which may be considered. *In re Carlson's License*, 330.

8. The agreement of counsel that the testimony may be omitted from the paper book, and that the finding of facts as contained in the opinion of the court below should be considered in lieu thereof by the Supreme Court, is nugatory. *Ibid.*, 330.

SURETY.

1. The surety on the recognizance of a defendant convicted of desertion, conditioned that the defendant will pay a weekly sum for the support of his wife, cannot be absolved from liability by an offer to surrender the body of the principal: the obligation of the recognizance is voluntary, and can be discharged only by payment according to its terms. *Miller v. Commonwealth*, 122.

2. The fact that, after agreeing with one of two sureties, in consideration of the receipt of one half of the debt, to release him from further liability, the creditor allows the statute of limitations to bar an action on the obligation against the other surety, discloses no consideration, by way of detriment to the promisee, supporting the promise to release. *Martin v. Frantz*, 389.

3. A right of action for contribution between co-sureties does not arise until one of them has paid more than a due proportion of the debt,

and until then the statute of limitations does not begin to run between them; wherefore, such right is unaffected by the fact that the statute may have barred any direct liability of the other surety to the creditor. *Ibid.*, 389.

TAXATION.

1. The provisions of § 4, act of June 30, 1885, P. L. 193, requiring the treasurers of corporations to assess a three mills tax upon the nominal value of corporate loans, to deduct the same from the interest paid thereon, and to return it into the state treasury, are not in violation of § 1, article IX. of the constitution of Pennsylvania, providing that all taxes shall be uniform upon the same class of subjects. *Coal Ridge Imp. Co. v. Jennings*, 397.

2. Nor is the said act of June 30, 1885, or said § 4, in violation of article V. or article XIV. of the amendments to the constitution of the United States, or to § 9 of article I. of the constitution of Pennsylvania, providing that no person shall be deprived of life, liberty or property without due process of law. *Ibid.*, 397.

TENANT IN COMMON.

See TIMBER.

TESTAMENTARY CAPACITY.

See ISSUE DEVISAVIT VEL NON.

TIMBER.

(a) Plaintiff made a contract with defendants to cut and skid timber at a certain price per thousand feet, the logs to be measured by Scribner's Rule. When the logs were cut and skidded, they were measured by the parties, the contract price paid and a receipt in full given. After some of the logs had been sawed, plaintiff, alleging a mistake against him in the measurement upon which he had settled, remeasured the unsawed logs and brought suit for the difference in the whole.

1. In such case, the mistake in the first measurement being shown, that measurement and the settlement thereon would not bar recovery in this action, and it was not error to charge the jury that if the plaintiff was to have the benefit of the mill measurement of the logs that had been sawed, he should be bound by that measurement of the logs unsawed and re-measured by him. *Horton v. Harbridge*, 11.

2. In trespass for cutting and converting timber trees, under § 3, act of March 27, 1824, 8 Sm. L. 283, where the plaintiffs show title only to the undivided three fourths of the land in question, and the defendants are in possession of the remaining one fourth, claiming title thereto though under a defective title, the parties must be regarded as tenants in common. *Bush v. Gamble*, 43.

3. The record of an ejectment wherein plaintiffs had recovered against the defendants the undivided three fourths of the premises, with the writ of habere facias and the return, established their actual possession

of the recovery at the time the action in trespass was brought, and their right of possession and title when the writ of ejectment issued. *Ibid.*, 48.

4. Though by § 2, act of May 4, 1869, P. L. 1251, a tenant in common may have against his co-tenant the same remedy as against a stranger, for the cutting and conversion of timber trees without his consent, yet that act does not authorize in his favor the penalty of double or treble damages provided by the act of March 27, 1824: *Wheeler v. Carpenter*, 107 Pa. 271. *Ibid.*, 48.

TOWNSHIP OFFICERS.

See HIGHWAYS.

See NEGLIGENCE.

TRESPASS.

See TIMBER.

TRESPASS D. B. N.

1. In this cause, an action of trespass against the sheriff for selling personal property of the plaintiff, a married woman, on an execution against her husband, the trial court properly submitted the facts in evidence to the jury, under correct instructions that the burden was upon the plaintiff to establish affirmatively by clear and satisfactory evidence that the goods claimed to have been unlawfully sold by the defendant, had been bought for her and paid for with money which she had of her separate estate. *Diehl v. Peterson*, 65.

(a) In an action of trespass for taking lumber, it appeared that the plaintiff's title to a larger lot of lumber had been determined by an action of replevin between plaintiff and same defendant, and there was evidence that the lumber taken, if not a part of the lumber replevied, was lumber to which the plaintiff had the same title, which fact was known to the defendant.

2. In such case, it was error to charge the jury that if the lumber taken was not part of the lumber replevied, "the title was not adjudicated in the replevin suit as against the defendant, and their verdict should be in his favor." *Garey v. Woodward*, 251.

TRIAL.

See COURT AND JURY, PROVINCE OF.

In an argument to the jury, counsel may refer to the almanac to show that a certain day of the month given in the testimony of a witness, was or was not a certain day of the week, though the almanac was not proved and put in evidence, judicial notice being taken of the fact, without evidence. *Wilson v. VanLeer*, 372.

TRUSTEES.

1. If an administrator or other trustee invest the trust funds with a

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private banker, without an order of court but in good faith and under the advice of counsel, he must suffer a loss resulting from the insolvency of the banker, even though the latter was in undoubted credit at the time of the loan. *Baer's Appeal*, 360.

2. A certificate given by a banker that an administrator had "deposited" in his office a sum of money payable to his order or the order of his attorney, "on return of this certificate, twelve months after date, with interest," evidences not merely a deposit but a loan or investment of the money. *Ibid.*, 360.

3. The legal effect of the certificate cannot be modified by parol evidence of a contemporaneous agreement that the money might be withdrawn, but without interest, at any time upon return of the certificate, except upon proof of its omission from the instrument by fraud, accident, or mistake. *Ibid.*, 360.

USURY.

(a) A borrower received \$5,000 giving a bond upon which judgment was entered, agreeing at the time to pay a bonus of \$300 for the loan. On December 19th, he gave the lender his note for \$300, the bonus agreed upon, payable in three instalments.

(b) After payment of one instalment on the note, the borrower executed to the lender a new bond for \$5,000 secured by a mortgage, whereupon the judgment referred to was satisfied; subsequently, he paid the remaining instalments of the \$300 note.

1. In such case the bonus represented by the note of December 19th was usurious, and in an action by an assignee of the bond and mortgage, the debtor was entitled to credit upon the mortgage debt for all the payments made upon that note; *Colvin v. Blymyer*, 121 Pa. 582, explained. *Blymyer v. Colvin*, 114.

WHOLESALE LICENSE.

See LICENSE TO SELL LIQUORS.

WILL.

See ISSUE DEVISAVIT VEL NON.

(a) A testatrix devised a house and lot to her three daughters, subject as follows: "It is my will and desire that my said daughters shall have the use and benefit of my said house and lot, jointly, so long as they shall remain single and unmarried, but in case either of my said daughters shall marry, then such daughter shall forfeit her right to the use and benefit of my said real estate, and the use and benefit of the same shall inure to the benefit of my remaining unmarried daughters or daughter, during their natural lives or the life of the survivor of them.

(b) "It is further my will that the survivor of my said unmarried daughters shall have the right to dispose of my said house and lot by will or otherwise, but in the event that either of my said daughters should die unmarried, then the share of such daughter in the said real estate shall descend to my remaining single or unmarried daughters or the survivor

of them. Should all of my said daughters marry, then the property shall be sold by them or the survivors of them and the proceeds shall be equally divided among them or their legal representatives."

(c) The testatrix bequeathed and devised, also, "all the rest and residue" of her estate to her said three daughters. One of said daughters died, intestate, unmarried and without issue, leaving her two sisters, also two brothers and children of a deceased brother, to survive her. Subsequently, the two surviving sisters, who were both unmarried, united in conveying the house and lot for a full consideration.

1. In such case, the two surviving sisters were vested with a valid fee simple title to the premises devised, and their deed conveyed such a title to their grantee. *Myers v. Bentz*, 222.

(a) A testator, after giving all his estate to his wife for life and creating a trust as to \$5,000 to take effect after her death in favor of his son for life, devised and bequeathed the "rest, residue and remainder" of his estate, after the death of his widow, to his "daughter Hannah, her heirs and assigns," but providing that in case his "said daughter Hannah, should die without child or children," his estate should be equally divided between his brother and sisters.

2. In such case, the words "should die without child or children," were intended to mean, die without child or children during the lifetime of the testator's widow, and the daughter, Hannah, upon the death of the widow, became seised of an indefeasible estate in fee simple in the property so devised to her. *McCormick v. McElligott*, 230.

3. A paper in the form of a will, devising real estate expressly in consideration of and as compensation for specific services to be rendered by the devisee, may operate as a memorandum of a contract for the sale of land sufficient to comply with the statute of frauds, and as such be admissible in evidence during the lifetime of the testator. *Smith v. Tuit*, 341.

4. Such paper, without evidence of anything done under it by the devisee, cannot be treated as anything more than a will, revocable at the mere pleasure of the testator; but when the testator has put the devisee in possession of the land devised, and the latter has fully complied with his part of the agreement, the devise loses its revocability and must be treated as an executed contract. *Ibid.*, 341.

5. If such instrument contain a provision that the devisee shall have possession of the land devised during the lifetime of the testator, and in pursuance of this provision the devisee obtain possession thereof and faithfully perform the specified conditions, he cannot be ousted from the land even by the testator, but has vested in him a right of possession sufficient to defeat ejectment brought by the testator or his grantee. *Ibid.*, 341.

(a) A witness, called to prove the signature of an alleged testator to a testamentary paper, testified that he had seen the testator write his name twice to letters thirty-two years, and once as an indorsement upon a check twenty-three years, prior to the time when he was called to testify.

6. There being no subsequent evidence raising any question as to the

truth of the facts so stated, the competency of the witness to express his opinion as to the signature, was a matter clearly for the court, and it was not error to refuse to allow the jury to review the ruling of the court thereon. *Wilson v. VanLeer*, 372.

7. The ruling that the witness was competent to testify concerning the handwriting, was within the line of the authorities, but, considering the untrustworthiness of opinions on handwriting in general, such evidence ought to be guarded with caution. *Ibid.*, 372.

8. The limit within which the witness must have seen the writing done, must depend upon his intelligence, his habits of observation and the apparent strength and confidence of his memory, which must be passed upon in the first instance by the trial judge. *Ibid.*, 372.

(a) A testator devised to his widow the "improvement and income" of his realty, "to keep for her own use, as long as she keeps my name." A subsequent provision directed that the widow should pay testator's debts, and if necessary should sell part of the realty for this purpose and keep the rest.

(b) Another provision directed that in case the widow re-married, she was to have "the one half of all my real and personal property for her own use, and the other half I bequeath to my three sisters;" and in case such division could not be made without spoiling the whole, the executor should sell the property and "divide money as directed."

9. Taking the whole will together, it created an estate for life determinable on the second marriage of the devisee: *Cooper v. Pogue*, 92 Pa. 254; and the devise was not enlarged by the subsequent provisions for the payment of debts and for the division of the property on the widow's re-marriage. *Long v. Paul*, 456.

10. Upon a case stated, for the purpose of construing a will, it is not error for the court in its opinion to refer, by way of illustration and in confirmation of its views, to certain clauses in an auditor's report made in a previous cause under the same will. *Ibid.*, 456.

(a) A testator by his will, after bequeathing a legacy of \$1,000 to his son H., divided the residue of his estate equally between his two sons H. and L., and then provided: "I desire that my son L. receive \$1,000 as soon as he arrives at the age of 21 years, and that the remainder of his share be invested in a farm, he, the said L., having full control of the farm, and receiving all proceeds therefrom, but not having power to sell," with remainder to his children.

11. In such case, the testator's intention was, that upon attaining his majority L. should have \$1,000 paid to him absolutely, and it was error for the court below to deduct therefrom advances made for L.'s maintenance, by his guardian, from time to time, under decrees of the Orphans' Court. *Lightner v. Lightner*, 468.

12. The remaining gift to L., under the will, was a present and absolute interest for life in the fund, vested upon the death of the testator. The income followed the title and was L.'s absolute property, applicable during minority to his maintenance, under direction of the court, but the accumulations payable to him at majority, in addition to the \$1,000. *Ibid.*, 468.

13. A devise in the following form: "I give, devise and bequeath to my son T. my farm and if he should die leaving no lawful heirs, the whole to descend to his brothers and sisters, share and share alike, or to their legal representatives," read in connection with other portions of the will, gave an estate-tail to the devisee. *Cochran v. Cochran*, 486.

14. Such an estate, devised by a will becoming operative prior to the act of April 27, 1855, P. L. 368, may be barred by deed duly executed, acknowledged and recorded, in accordance with the provisions of the act of January 16, 1799, 3 Sm. L. 338. *Ibid.*, 486.

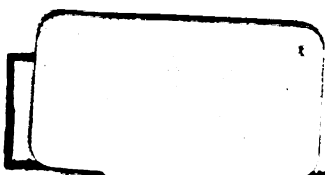
WITNESS.

See HANDWRITING.

In an action by an executor or administrator based on a claim in favor of the estate, a legatee or distributee, who has parted with his interest, either by release, payment or assignment, is a competent witness for the plaintiff, unless there is some other ground of exclusion than the fact that he is a legatee or distributee. *Hest v. Ogle*, 244.

Enc. J. L.

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